83-1327

Office - Supreme Court, U.S.
FILED
FEB 10 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-___

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

CLIFTON N. CHERRY, et ux., et al.,

Petitioners

v.

WESLEY E. STEINER, et al.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Daniel J. McAuliffe
(Counsel of Record)
Mark Wilmer
Robert B. Hoffman
SNELL & WILMER
3100 Valley Bank Center
Phoenix, Arizona 85073
Attorneys for Petitioners

QUESTIONS PRESENTED

1. Whether the 1980 Arizona Groundwater Management Act, A.R.S. §45-401 *et seq.*, deprived petitioners, without compensation, of valuable rights to groundwater, which were in the nature of property interests under Arizona law.

2. Whether the decision of the Arizona Supreme Court in *Town of Chino Valley v. City of Prescott*, 131 Ariz. 78, 638 P.2d 1324 (1981), *appeal dismissed*, 457 U.S. 1101 (1982), in its effort to sustain the 1980 Groundwater Management Act, re-defined the nature of property rights in groundwater in such a drastic and unpredictable fashion as to itself deprive petitioners of their property without due process of law.

3. Whether the Arizona legislature's conclusive determination, without administrative or judicial recourse for relief, that petitioners' lands possess characteristics justifying the imposition of strict groundwater pumping and usage regulation deprives petitioners of due process of law.

4. Whether the Arizona legislature improperly delegated to an unidentified administrative official authority to define, subject to no legislatively prescribed standards whatsoever, the portions of the state to be subjected to the Act's regulations.

PARTIES INVOLVED

The plaintiffs-appellants in the court below, petitioners herein, are Clifton N. Cherry, Betty G. Cherry, Buck Jensen, Esther Jensen, Elmer Young, Lavera W. Young, Young Acres, Inc., Verde P. Cain, Helen C. Cain, Norman W. Fain, Johnny Lee Fain, Norman W. Fain, II, Nancy Fain, Shamrock Water Company, and Fain Land & Cattle Company. The defendants-appellees were Wesley E. Steiner, Director of the Arizona Department of Water Resources; Rose Mofford, Secretary of the State of Arizona; and, Patsy Jenney, Recorder of Yavapai County, Arizona.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties Involved	i
Table of Contents	ii
Table of Authorities	iii
Opinions Below	1
Jurisdiction	2
Constitutional and Statutory Provisions Involved	2
Statement of the Case	2
Reasons for Granting the Writ	8
I. In Order To Uphold The Act, The Lower Courts Sanctioned Patent Evasions Of The Constitutional Guarantee Of Due Process And Expanded The Scope Of The Police Power Beyond Bounds Previously Established By This Court	9
A. *Petitioners' Pre-Act Groundwater Rights*	9
B. *The Effect of the 1980 Act on Pre-Chino Valley II Groundwater Rights*	9
C. *Justifications for the 1980 Act*	16
1. *The non-property defense*	16
2. *The "police power" justification*	18
II. The Legislative Creation Of Initial Active Management Areas Deprives Landowners Therein Of Due Process Of Law	20
III. The Act Was Unconstitutionally Vague And Incomplete At The Time Of Its Enactment	22
Conclusion	25
Certificate of Service by Mail	26

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS:	*Page*
United States Constitution:	
Fifth Amendment, *U.S. Const.* amend. V.	2,9
Fourteenth Amendment, *U.S. Const.* amend. XIV	9
Ariz. Const., art. 4, pt. 1, §1	22
CASES:	
Agins v. City of Tiburon, 447 U.S. 255 (1980)	19
Andrews v. Drew Municipal Separate School Dist., 507 F.2d 611 (5th Cir. 1975)	22
Bristor v. Cheatham (Bristor I), 73 Ariz. 228, 240 P.2d 185 (1952)	10
Bristor v. Cheatham (Bristor II), 75 Ariz. 227, 255 P.2d 173 (1953)	10,13,14
Cherry v. Steiner, 543 F.Supp. 1270 (D. Ariz. 1982), *aff'd.*, 716 F.2d 687 (9th Cir. 1983)	1,6,16,22
Cherry v. Steiner, 716 F.2d 687 (9th Cir. 1983), *aff'g.*, 543 F. Supp. 1270 (D. Ariz. 1982)	1,24
Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226 (1897)	17
Chicago R.I. & P.R. Co. v. United States, 284 U.S. 80 (1931)	16
deLaurier v. San Diego Unified School Dist., 588 F. 2d 674 (9th Cir. 1978)	22
Erie Railroad v. Tompkins, 304 U.S. 64 (1938)	18
Farmers Investment Co. v. Bettwy, 113 Ariz. 520, 588 P.2d 14 (1976)	12,14
Field v. Clark, 143 U.S. 649 (1892)	24
Fourzan v. Curtis, 43 Ariz. 140, 29 P.2d 722 (1934).	11
Greene v. McElroy, 360 U.S. 474 (1959)	21

CASES (continued) — *Page*

Howard v. Perrin, 8 Ariz. 347, 76 P. 460 (1904), *aff'd.*, 200 U.S. 71 (1906) 10

Hughes v. Washington, 389 U.S. 290 (1967) 17,18

In re Forsstrom, 44 Ariz. 472, 38 P. 2d 878 (1934) 16

Jarvis v. State Land Department, 104 Ariz. 527, 456 P.2d 385 (1969) 11,13,14

Kaiser Aetna v. United States, 444 U.S. 164 (1979) ... 19

Maricopa County Municipal Water Conservation Dist. v. Southwest Cotton Co., 39 Ariz. 65, 4 P.2d 369 (1931) 10,13,18

Midkiff v. Tom, 702 F.2d 788 (9th Cir. 1983), *prob. juris. noted sub nom. Hawaii Housing Authority v. Midkiff*, ____ U.S. _____, 52 USLW 3342 (Oct. 31, 1983) 8,9,14,19,20

Muhlker v. New York and Harlem R.R. Co., 197 U.S. 544 (1905) 17

Ochoa v. Hernandez y Morales, 230 U.S. 139 (1913) 20

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) 19

Southwest Engineering Co. v. Ernst, 79 Ariz. 403, 291 P.2d 764 (1955) 17,18

State Compensation Fund v. de la Fuente, 18 Ariz. App. 246, 501 P.2d 442 (1972) 23,24

State ex rel. Morrison v. Anway, 87 Ariz. 206, 349 P.2d 774 (1960) 11

State ex rel. Weiks v. Tumwater, 66 Wash. 3d 33, 400 P.2d 789 (1965) 23

Town of Chino Valley v. State Land Dep't., 119 Ariz. 243, 580 P.2d 704 (1978) 12,14,18

Town of Chino Valley v. City of Prescott, 131 Ariz. 78, 638 P.2d 1324 (1981), *appeal dismissed*, 457 U.S. 1101 (1982) i,7,9,10,13,16

CASES (continued) *Page*

United States v. Gerlach Live Stock Co., 339 U.S. 725 (1950) 20

Vlandis v. Kline, 412 U.S. 441 (1973) 21,22

STATUTES:

Arizona Laws 1980, 4th Special Sess., Ch. 1, "1980 Arizona Groundwater Management Act" (the "Act" or the "1980 Act") ..... i,1, *passim*

Arizona Revised Statutes (1982):

§45-401 3
§45-402 3
§45-411 5,22
§45-412 3,6,21
§45-413 6
§45-414 6
§45-417 6
§45-451 3
§45-454 3
§45-462 3,4,14
§45-463 4
§45-464 4
§45-465 4
§45-469 4,14
§45-472 4,14
§45-476 4
§45-492 4
§45-511 *et seq* 4
§45-541 5

STATUTES (continued): *Page*

§45-542 5
§45-544 5
§45-561 3
§45-562 3
§45-576 5
§45-611 *et seq.* 4

United States Code:

28 U.S.C. §1254(1) 2
28 U.S.C. §1291 7
28 U.S.C. §1331 7
28 U.S.C. §1652 9,18

Rules of the Supreme Court:

Rule 21.1(b) 1
Rule 21.1(k) 1

No. 83-___

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

CLIFTON N. CHERRY, et ux., et al.,

Petitioners

v.

WESLEY E. STEINER, et al.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Clifton N. Cherry, *et al.* [1] hereby petition for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Appendix A) is reported at 716 F.2d 687. [2] The opinion of the district court (Appendix B) is reported at 543 F. Supp. 1270.

[1] The petitioners are listed under PARTIES INVOLVED, *supra*, as required by Rule 21.1 (b) of this Court.

[2] Due to the length of the materials required by Rule 21.1 (k) to be included in an Appendix, a separate volume of Appendices is submitted with this Petition.

JURISDICTION

The judgment and opinion of the court of appeals was issued on September 22, 1983. (Appendix A). A timely petition for rehearing was denied, and a companion suggestion of the appropriateness of rehearing *en banc* rejected, by order of the court of appeals, entered on November 14, 1983. (Appendix C). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The fifth amendment to the Constitution, *U.S. Const.* amend. V, provides:

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

The provisions of the 1980 Arizona Groundwater Management Act, codified in Title 45, Arizona Revised Statutes, Sections 45-401 *et seq.* have been set forth in Appendix D.

STATEMENT OF THE CASE

This case concerns the validity of the 1980 Arizona Groundwater Management Act (hereinafter "the 1980 Act" or "the Act"), a purportedly conservationist measure passed by the Arizona legislature in a one-day special session held on June 11, 1980, and signed into law by the Governor the

following day.[3] The Act is a complex piece of legislation whose avowed purpose was to "conserve, protect and allocate the use of groundwater resources of the state and to provide a framework for the comprehensive management and regulation of the withdrawal, transportation, use, conservation and conveyance of rights to use groundwater in [Arizona]." §45- 401(B) (App. D, p. D-1)

The linchpin of the Act's regulatory scheme is the creation of "Active Management Areas" (hereinafter "AMAs"), which supposedly encompass relatively distinct hydrological bodies or related bodies of water, termed groundwater basins or sub-basins. §§45-402(2), (27); 412(B) (App. D, pp.D-1, 5,11,12). The Act governs all withdrawals and uses of groundwater, §45-451 (App. D, p.D-24), except for very small wells drawing water for domestic purposes. §§45-402(7), 454 (App.D., pp.D-2, 28),[4] and severely limits who can withdraw groundwater within an AMA.

Initially, "the right to withdraw or receive and use groundwater" within an AMA may be extended only to "a person who was legally withdrawing and using groundwater *as of the date of designation* of the active management area or who owns land legally entitled to be irrigated with groundwater . . ." (emphasis added). §45-462(A)(App. D., p. D-30).[5] In addition, out of those actually drawing or using

---

[3] The provisions of the Act are quite voluminous and, accordingly, they have been set forth in Appendix D. The Act is codified in Title 45, Arizona Revised Statutes. Sections 45-401, *et seq.* References herein to particular provisions of the Act will be to its Section number in Title 45.

[4] Management goals are established by the Act for each area, to be achieved through a series of five-year plans promulgated by the Director of the Department of Water Resources (the "director"). The goal for the Prescott Initial Active Management Area is to achieve "safe yield" (a balance between annual groundwater withdrawals and recharge) by the year 2025. §§45-561, 562 (App. D., pp. D-79, 80).

[5] As is explained hereinafter, the Act itself created four "initial AMAs". For these "initial AMAs", one of which includes petitioners' lands, the date of designation was the effective date of the Act—June 12, 1980.

groundwater on the date of the AMA's creation, only three classes of persons are permitted to continue to do so. One of these are cities and towns, and private water companies, which are granted virtually unlimited access to groundwater that can be reached from land within their service areas. §45-492(App. D., p. D-57). The second are persons who can qualify for withdrawal permits. §§45-511 *et seq.* (App. D., pp. D-63 *et seq.*).

The final group are some, but not all, of the private landowners who had withdrawn or used groundwater in the AMA prior to its establishment. §45-462 (App. D., pp. D-29, 30). Even these persons, however, must apply and qualify for one of three types of "grandfathered right" to use specified amounts of groundwater. §45-476 (App. D., p. D-49). A Type 1 non-irrigation right is available to owners of land retired from irrigation between 1965 and the Act's effective date. §45-463(A)(App. D., p. D-30). A Type 2 non-irrigation right is available to owners of land "from which groundwater was being withdrawn and used for a non-irrigation purpose" on the Act's effective date. §45-464(A) (App. D., p. D-32). An irrigation grandfathered right is extended to owners of land "legally irrigated at any time during the five years preceding January 1, 1980 . . ." §45-465(A) (App. D.,p.D-34).[6] All drawers of groundwater must pay an annual fee for that privilege, measured by the amount drawn. §§45- 611 *et seq.* (App.D, pp. D-109 *et seq.*)

The transportation of water away from the land from which it is withdrawn is also addressed by the Act. Such

[6] "Irrigation" is defined by the Act as the use of groundwater for agricultural purposes. "Irrigation grandfathered rights" may be granted to owners who legally irrigated their land in the five years prior to January 1, 1980. §45-465 (App. D., p. D-34). After the effective date of the Act, such an "irrigation grandfathered right" may not be converted to a "Type 1 non-irrigation right", by retiring the land from agriculture, unless the land lies outside the service area of a city, town or private water comoany. If the holders of "irrigation rights" own land in such a service area, and desire to devote the land to non-agricultural purposes, the right to use groundwater is lost. §§45-469, 472 (App. D., pp. D-39, 42).

water may be freely transported within a "sub-basin" of an active management area, and the transferor will not be liable for damages. §45-541 (App. D., p. D-77). Moreover, certain transfers may even be made outside sub-basins or even outside AMAs without the transferor being subject to an injunction or the payment of damages. §45-542 (App. D., p. D-77). The transportation of ground water away from the land from which it was pumped will subject the transporter to an award of damages only in very limited instances. §45-544(2) (App. D., p. D-79).

Under §45-576 (App. D., p. D-92 *et seq.*), the Act permits residential development only if the Director of the Department of Water Resources ("the director") issues a certificate of assured water supply, or the development is in an area designated by the director as having such an assured supply, which is statutorily defined, *inter alia*, to be a sufficient supply "to satisfy the water needs of the proposed use for at least one hundred years." §45-576(J) (App. D., pp.D-96, 97). A private water company may have its service area designated as having an assured supply by receiving an allocation of Central Arizona Project ("CAP") water, by making an unconditional offer to purchase such CAP water, and by convincing the director that it has undertaken to develop a delivery system for such water. To have its service area so designated, a city or town need only sign a letter of intent to contract for CAP water, regardless of whether it has actually contracted for such water or is in a position to receive it.

As noted, the pervasive restrictions which the Act imposes on the withdrawal and use of groundwater apply only to lands which fall within the boundaries of an AMA. The Act itself created and defined four initial AMAs: Phoenix, Tucson, Pinal and Prescott, the boundaries of which were purportedly delineated in maps described as on file in the Arizona Secretary of State's office on the Act's effective date. §45-411 (App.D,pp.D-10,11). As the district court correctly observed: "there are no administrative means for modifying the boundaries of the initial AMA's. This was

legislatively accomplished and can be modified only by the legislature." *Cherry v. Steiner*, 543 F. Supp. 1270, 1275 (D. Ariz. 1982), *aff'd*, 716 F.2d 687 (9th Cir. 1983) (App. B, p. B-6).

The Act's geographic scope can, however, be administratively expanded, but in a fashion that contrasts sharply with the manner in which initial AMAs were created. The director is given the authority to include unregulated areas in "subsequent active management areas", but only if the lands in these areas are found to exhibit one of three criteria specified by the Act. §45-412 (App. D, pp. D-11, 12). Such a determination may only be made after a properly noticed public hearing, must be supported by published written findings, and is subject to judicial review. §§45-413, 414 (App. D, pp. D-12, 13). The director has authority to review and modify the boundaries of such subsequent AMAs, but must adhere to the same procedural requirements in doing so. §45-417 (App. D, p. D-16). There is no procedure in the Act, and the director is granted no authority, to alter or amend the boundaries of the initial AMAs.

Petitioners, plaintiffs-appellants below, are all landowners within the Upper Agua Fria Subbasin of the Prescott Initial Active Management Area created by the Act. All of their lands became immediately subject to the Act's restrictions upon its passage. Affidavits submitted to the district court, which have never been challenged or controverted, establish that the Act has deprived petitioners, to varying degrees, of the right to draw and use groundwater beneath their lands, and has caused each of them substantial economic loss, through the loss of investments in pumping and related equipment, deprivation of their legitimate development expectations, and drastic reductions in the fair market value of their land.

Petitioners commenced this action in the district court challenging the Act on various grounds, including that it deprived them of valuable property without just compensation, that it contained impermissible irrebuttable presump-

tions and similarly impermissible references to non-existent extrinsic documents. Petitioners sought, *inter alia*, a judgment declaring the Act unconstitutional as violating the due process and equal protection clauses of the Fifth and Fourteenth Amendements to the United States Constitution. The district court exercised jurisdiction under 28 U.S.C. §1331 and, upon consideration of cross-motions for summary judgment, granted summary judgment in favor of the defendants and the Act (Appendix B).

A timely appeal was taken to the United States Court of Appeals for the Ninth Circuit, which exercised jurisdiction pursuant to 28 U.S.C. §1291. The court of appeals issued its judgment and opinion, affirming the district court, on September 22, 1983 (Appendix A). The court of appeals addressed itself to only three issues. Initially, the court held that consideration of the constitutional questions presented was not foreclosed by this Court's summary dismissal of the appeal in *Town of Chino Valley v. City of Prescott*, 131 Ariz. 78, 638 P.2d 1324 (1981), *appeal dismissed*, 457 U.S. 1101 (1982) *(Chino Valley II)*. [7]

The court of appeals then held that the decision of the Arizona Supreme Court was not a startling departure from its past pronouncements on the nature of private rights to groundwater, and could properly be considered by the district court. Finally, the court of appeals held that the district court had improperly foreclosed inquiry into whether the Act contained impermissible references to extrinsic documents, but conducted its own *de novo* review of the question and ruled in favor of the Act.

As to the balance of the questions presented, including the constitutional challenges to the Act, the court of appeals merely adopted the opinion of the district court. A timely petition for rehearing was denied by an order entered on November 14, 1983 (Appendix C).

---

[7] This Petition does not question the propriety of this holding of the court of appeals, as that was the disposition urged by petitioners.

REASONS FOR GRANTING THE WRIT

The scarcity of water resources, and their consequent economic value, are not conditions peculiar to Arizona, but have continually plagued the entire Western region of the United States. As the rapid expansion of this area of the country continues and accelerates in the future, legislators will increasingly be called upon to devise schemes for allocating this scarce resource among increasing competing demands. The opinions below have sanctioned a most unfortunate model for those efforts.

Masquerading as a conservationist measure, the Act effectively obliterates private rights to groundwater which had been recognized by the Arizona courts as vested rights of property since the beginning of this century. By holding that this can validly be accomplished in the exercise of the police power, the decisions below have effectively signaled that private rights to property, in this case groundwater, may be forfeited at the whim or caprice of the legislature, and that the obvious constitutional problems can be avoided through the simple expedient of having the state courts change the definition of what constitutes protectible property interests.

This Court has already agreed to hear a case, *Midkiff v. Tom*, 702 F.2d 788 (9th Cir. 1983), *prob. juris. noted sub nom. Hawaii Housing Authority v. Midkiff*, ____ U.S. _____, 52 USLW 3342 (Oct. 31, 1983), which presents the question whether the taking of property from one owner and transferring it to another is a taking for a "public use." An even more compelling case for review is presented here, where the lower courts have held that such a transfer does not even constitute a "taking."

Finally, it is particularly important that this Court consider that question in a setting where the property involved is a valuable natural resource in a rapidly developing area of the nation. Water in the West is at once both scarce and essential — in Arizona, at least, waterless land is worthless land. There are a host of competing demands for this resource, not all of which can be satisfied. The danger

that those who want that resource can secure legislation taking it from those who own it is no longer fanciful—the 1980 Act accomplishes exactly that. As the court held in *Midkiff v. Tom, supra:*

> . . . it was the intention of the framers of the Constitution and the fifth Amendment that this form of majoritarian tyranny should not occur.

Id., 702 F.2d at 790.

I

IN ORDER TO UPHOLD THE ACT THE LOWER COURTS SANCTIONED PATENT EVASIONS OF THE CONSTITUTIONAL GUARANTEE OF DUE PROCESS AND EXPANDED THE SCOPE OF THE POLICE POWER BEYOND BOUNDS PREVIOUSLY ESTABLISHED BY THIS COURT

The due process clause of the Fifth Amendment, applicable to the states through the Fourteenth Amendment, contains the unequivocal mandate that "private property [shall not] be taken for public use without just compensation." *U.S. Const.* amend. V. The principal question presented in this case is whether the restrictions imposed by the 1980 Act upon petitioners' withdrawal and use of groundwater from beneath their lands transgressed that prohibition. In resolving that question, the lower courts were called upon to identify the nature and extent of petitioners' property rights to groundwater and the effect of the legislation upon those rights, and then to assess whether an unconstitutional taking had occurred.

A. Petitioners' Pre-Act Groundwater Rights

As the court of appeals correctly noted, the question of whether a particular interest adversely affected by legislation is a right of property is, under 28 U.S.C. §1652, a question of state law. Prior to the Act, Arizona law concerning rights to groundwater was virtually all decisional, and at least prior to the Arizona Supreme Court's decision in *Chino Valley II*, almost uniformly consistent—percolating groundwater

beneath the land was *owned* by the landowner and this constituted a valuable *property right.*

The subject was initially addressed in *Howard v. Perrin,* 8 Ariz. 347, 76 P. 460 (1904), *aff'd.,* 200 U.S. 71 (1906), when the Territorial Supreme Court characterized groundwater as "*a component part of the earth,* having no characteristic of ownership distinct from the land itself, and therefore not the subject of appropriation by another, but *belonging to the owner of the soil.*" 8 Ariz. at 353, 76 P. at 462 (emphasis added). This rule was reconfirmed by the Arizona Supreme Court in *Maricopa County Municipal Water Conservation District v. Southwest Cotton Co.,* 39 Ariz. 65, 4 P.2d 369 (1931), after an extensive review of the issue prompted by the court's recognition that the principles it was to announce would "govern . . . future agricultural development within the arid regions of Arizona" and "should be enunciated as clearly and definitely as possible, so that our citizens may know how to guide their future procedure . . ." 39 Ariz. at 71, 4 P.2d at 472. Cognizant of the task before it and its precedential significance, the court announced the following rule:

> . . . percolating subterranean waters [are] the property of the owner of the land, subject to the rules of the common law.

Id., 39 Ariz. at 78-79, 4 P.2d at 374.

That rule remained, with one brief *interregnum,* the governing principle of Arizona law concerning rights to groundwater until the decision in *Chino Valley II.*[8] This Court's oft-expressed desire for brevity in petitions of this

[8] The sole hiatus in an otherwise unbroken chain of judicial pronouncements of similar import was the decision in *Bristor v. Cheatham,* 73 Ariz. 228, 240 P.2d 185(1952) *(Bristor I),* which repudiated earlier rulings and announced that *in futuro* the principle of prior appropriation would govern groundwater rights. *Bristor I* was promptly and emphatically repudiated on rehearing by the decision in *Bristor II, Bristor v. Cheatham,* 75 Ariz. 227, 255 P.2d 173 (1953), which articulated the "reasonable use" doctrine. (See discussion in text).

nature precludes an extended discussion of the subsequent decisions reconfirming the rule of *Southwest Cotton*. The following representative sample of excerpts from decisions of the Arizona Supreme Court will serve to demonstrate that *Southwest Cotton* retained its vitality until the aberrational departure in *Chino Valley II*:

> It is the law of Arizona that percolating waters belong to the owner of the land on which they are found. [9]
>
> * * * *
>
> It has been the recognized law of this state since 1904 that water filtrating or percolating through the soil beneath the surface of the land in undefined and unknown channels is a component part of the earth, having no characteristic of ownership distinct from the land itself and therefore belongs to the owner of the soil. [10]
>
> * * * *
>
> The doctrine [of *Bristor v. Cheatham*, 73 Ariz. 288, 240 P.2d 185 (1952)] was bitterly assailed on rehearing and the court then in deciding that the *owners of the land had a vested property right in the water underlying* unequivocally committed this state to the doctrine of reasonable use. . . . [11]
>
> * * * *
>
> The question presented for decision is whether the doctrine of reasonable use as it has heretofore been judicially determined in Arizona permits percolating waters to be used off the lands from which they are pumped if thereby others whose lands overlie the common supply are injured or damaged thereby.

---

[9] *Fourzan v. Curtis*, 43 Ariz. 140, 147, 29 P.2d 722, 725 (1934).

[10] *State ex rel. Morrison v. Anway*, 87 Ariz. 206, 208, 349 P.2d 774, 775 (1960).

[11] *Jarvis v. State Land Department*, 104 Ariz. 527, 529, 456 P.2d 385, 387 (1969) (emphasis added).

The principles controlling in this case have been set forth in detail and in unequivocal language by this Court in many decisions. Twenty-three years ago, on March 14, 1953, the Court published its decision on rehearing in Bristor v. Cheatham, 75 Ariz. 227, 255 P.2d 173 (1953), in which it committed Arizona to the American doctrine of reasonable use. The decison emphasized that this State had adopted the principle of reasonable use 49 years before, and that whether the Court should after nearly 50 years under an announced rule depart from it depended upon may questions, the most important of which was *the protection of property rights acquired upon the faith of the Court's pronouncement of the law.* Our exact language was: (M)any and large investments have been made in the development of ground waters. *Under these circumstances the court's announcement of the rule becomes a rule of property.* ... and when a decision does become a rule of property, the rights acquired thereunder are entitled to protection under the law as declared. [12]

* * * *

At the outset it must be conceded that the interests which petitioners seek to protect are property rights. We recognized in *Farmers Investment Company v. Bettwy, supra,* that the doctrine of reasonable use as judicially determined in Arizona *had become a rule of property and was entitled to protection as such.* Under the doctrine of reasonable use property owners have the right to capture and use the underground water beneath their land for a beneficial purpose on that land, but no landowner can transport water off the land from which it came if the transfer injured the water supply of neighboring property owners. [13]

---

[12]*Farmers Investment Co. v. Bettwy,* 113 Ariz. 520, 525, 558 P.2d 14, 19 (1976) (emphasis added).

[13]*Town of Chino Valley v. State Land Dep't.,* 119 Ariz. 243, 248, 580 P.2d 704, 709 (1978) *(Chino Valley I)* (emphasis added).

Prior to *Chino Valley II*, Arizona decisions had "unequivocally committed this state to the doctrine of reasonable use" and those decisions had become "a rule of property." As announced in *Southwest Cotton, supra*, and elaborated in *Bristor II*, the rule provides that: (a) percolating groundwater is the property of the owner of the overlying realty, (b) that landowner may withdraw groundwater and use it for a useful and beneficial purpose upon that land, (c) that landowner may withdraw groundwater and convey it away from the land for a useful and beneficial purpose, but only if (or to the extent) the groundwater resource of other landowners in the same area is not thereby damaged.

B. The Effect of the 1980 Act on Pre-Chino Valley II Groundwater Rights

It is of significance that neither the district court nor the court of appeals quarreled with the proposition that the 1980 Act severely limited the rights of petitioners' and others to the use of groundwater beneath their lands. This was not an inadvertent omission — the draconian effect of the Act on pre-existing rights to pump and use groundwater is clear and unequivocal.

Prior to the Act, Arizona case law conferred on Arizona landowners the following "bundle of rights" in groundwater percolating beneath their land.

a. The landowner owned groundwater beneath the land and had the right to withdraw it for any beneficial use on the land. *Bristor v. Cheatham (Bristor II), supra.*

b. The landowner could transport groundwater drawn from the land for any reasonable or beneficial use on other lands, so long as that use did not impair or damage the groundwater source of any adjoining landowner. *Jarvis v. State Land Department, supra.*

c. The landowner had remedies, in the form of an injunction or damages, against other users of the common groundwater supply who transported it for use on other lands and thereby impaired the original land-

owner's resource. *Bristor II, supra; Farmers Investment Co. v. Bettwy, supra; Jarvis, supra.*

It bears repeating that these rights were consistently characterized by the Arizona Supreme Court as having ripened into "a rule of property and ... entitled to protection as such." *Chino Valley I, supra,* 119 Ariz. at 248.

The effect of the Act on these rights is abundantly clear. Landowners lose their ownership rights in groundwater beneath their lands. In place of these ownership rights, certain landowners, *but not all,* receive the right to apply for a grandfathered right to use groundwater. Most importantly, the "grandfathered rights" regime is not co-extensive with the "ownership rights regime" which it replaced.

Prior to the Act, the landowner owned groundwater beneath the land, whether it was being withdrawn or not. Grandfathered rights, on the other hand, are only available to those *actually drawing groundwater* on the Act's effective date. §45-462 (App. D, pp. D-29, 30). Indeed, an irrigation grandfathered right is available only to those who used groundwater between 1975 and 1980. With respect to non-irrigation (developmental) uses, the limitation is even more drastic — a landowner within an AMA who was not withdrawing groundwater on June 12, 1980 *may not do so in the future.* The right to withdraw groundwater from beneath these lands for those purposes is irretrievably lost.

In that circumstance, the loss imposed by the Act is dramatic, because it is immediate. The landowner fortunate enough to be drawing groundwater for irrigation purposes on June 12, 1980 does not escape unscathed, however. The Act permanently eliminates for that individual all other options for use of the land if it lies within a water company's service area. If the landowner opts to abandon farming and to devote the land and its water to a non-irrigation use, all rights to draw groundwater from that land are forfeited. §§45-469, 472 (App. D, pp. D-39, 42).

The provisions of the Act governing the transportation of mined groundwater add an exacerbating dimension which both lower courts simply ignored. Under the Act, pumped groundwater may be transported within a sub-basin of an

AMA without subjecting the transporter to claims for an injunction or damages. Thus, those who pumped groundwater prior to 1980 and qualify for grandfathered rights, and cities, towns, and private water companies, may withdraw groundwater from the common supply under the appellants' land, and transport it for use elsewhere. If the common supply is thereby impaired, the adjoining landowners are powerless to prevent it, and are deprived of any legal recourse for the damages they suffer.

The principal beneficiaries of this arbitrary cutoff can be readily identified. They are other landowners fortunate enough to have been pumping groundwater when the Act became effective, and municipalities and private water companies who are given virtually unrestricted rights to pump groundwater within their service areas. This transfer of valuable property rights from one class of individuals to another is a clear consequence of the Act and is just as clearly indefensible. As the court held in *Midkiff v. Tom, supra:* "The sovereign may not take the private property of A and transfer it to B solely for B's private use and benefit." 702 F.2d at 793.

As noted, the lower courts did not even attempt to deny the confiscatory effect of the Act. Only the defendants-appellees engaged in that exercise and, in doing so, conceded the obvious. They offered the pallid defense that "no beneficial uses of groundwater which existed on the effective date of the Act . . . are prohibited . . . ", a transparent admission of the accuracy of petitioners' characterization of the Act's effect. They then suggested alternatives available to petitioners to secure groundwater for use on their land — principally, the purchase of additional land with grandfathered rights, the acquisition of grandfathered rights, and the purchase of service from a public or private water company. These alternatives share one common characteristic — all involve the purchase of water, water rights or land from others. It turns almost two hundred years of constitutional jurisprudence on its head to suggest that the taking of property rights without compensation is somehow cured by permitting the condemnee to purchase similar rights from others.

C. **Justifications for the 1980 Act**

As noted, neither the district court nor the court of appeals was persuaded by the transparent argument that the Act worked no meaningful deprivation of petitioners' groundwater rights. To the contrary, the lower courts relied on two separate but related propositions to find the Act defensible. The first was the notion that the rights of which petitioners were deprived did not constitute protectible "property". The second was that the deprivation could be justified by invoking the talisman of the "police power". Analysis shows both these rationales to be without substance.

1. **The non-property defense.**

Both lower courts implied, without expressly holding, that the rights to groundwater of which petitioners were deprived did not constitute protectible property interests, in light of the decision in *Chino Valley II*. That decision held, in the face of three quarters of a century of precedent to the contrary, that:

> . . . there can be no ownership in seeping and percolating waters until they are reduced to actual possession and control . . . Like wild animals free to roam as they please, they are the property of no one.

Chino Valley II, 131 Ariz. at 82, 638 P.2d at 1328. Reliance on *Chino Valley II* as sounding the "death knell" for constitutional challenges to the Act, as the district court concluded, *Cherry v. Steiner*, 543 F. Supp. at 1277 (App. B, p. B-10), is at once both improper and insidious.

Initially, even if one accepts *arguendo* the notion, first articulated in *Chino Valley II*, that an Arizona landowner's rights extended only to the *use* of groundwater, the question remains whether *that right* was unconstitutionally taken by the Act. This Court has previously held that:

> Confiscation may result from a taking of the use of property without compensation quite as well as from the taking of title.

Chicago, R.I. & P.R. Co. v. United States, 284 U.S. 80, 96 (1931). *Accord, In re Forsstrum*, 44 Ariz. 472, 481, 488, 38 P.2d 878 (1934). Both the lower courts wholly failed to

assess the constitutional implications of the Act's undeniably restrictive effect on rights to the use of groundwater.

Perhaps more importantly, both lower courts failed to grasp and properly apply the rule that judicial decisions can themselves amount to unconstitutional deprivations of property when they enunciate rules of property which depart drastically from existing precedent. *See, e.g., Hughes v. Washington*, 389 U.S. 290 (1967) (Stewart, J., concurring); *Muhlker v. New York and Harlem R.R. Co.*, 197 U.S. 544, 569-571 (1905); *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 241 (1897). The rationale for this rule has been cogently expressed by Mr. Justice Stewart "... a State cannot be permitted to defeat that constitutional prohibition against taking of property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all." *Hughes v. Washington, supra*, 389 U.S. at 296-97 (concurring opinion).

The court of appeals recognized the rule but agreed with the district court, wihout elaboration, that *Chino Valley II* was not a "startling departure" from past judicial pronouncements. The district court based this conclusion on a perceived lack of clarity in prior Arizona law on the subject, which conclusion was in turn based entirely on the decision in *Southwest Engineering Co. v. Ernst*, 79 Ariz. 403, 291 P.2d 764 (1955).

That decision, however, concerned and sustained a provision of the 1948 Groundwater Code which prohibited the drilling of new groundwater wells for agricultural purposes in certain critical groundwater areas. In effect, that statute and that decision merely told certain Arizona landowners that they could not devote their property (groundwater) to one particular use. It certainly did not question the fact that the groundwater was owned by the landowners affected, and could be used for all other purposes. The limitation on new wells for one particular purpose sustained there is a far cry from the prohibition of any new withdrawals for any purpose which the 1980 Act imposes.

More significantly, the representative quotations set forth earlier are, with one exception, from Arizona decisions which were rendered *subsequent* to *Southwest Engineering*.

The decison in *Southwest Engineering* did not even purport to be inconsistent with *Southwest Cotton* and *Bristor II*, which preceded it; it certainly cannot be viewed as overruling or questioning decisions rendered twenty years later.

In its decision in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), this Court put to its final rest the notion that a federal common law could be created and applied by the federal judiciary. In light of that decision, and its partial codification in 28 U.S.C. §1652, it is appropriate that federal courts look to state law, at least initially, on property law questions. On the other hand, this deference to state law in property matters cannot lead, as it has in this case, to the abdication of the federal judiciary's role as the protector of federal constitutional guarantees.

To the contrary, the federal courts were admonished by this Court, in *Hughes v. Washington, supra*, to be watchful lest constitutional guarantees be thwarted through the subterfuge of redefining property rights under state law. That is precisely what this case entails. Groundwater in Arizona was declared in 1931 to be "the property of the owner of the land" (*Southwest Cotton, supra*, 39 Ariz. at 78-79, 4 P.2d at 374) and, by 1978, this "had become a rule of property and ... entitled to protection as such." (*Chino Valley I, supra*, 119 Ariz. at 248, 580 P.2d at 709). Only two years later, ownership was cavalierly re-defined as simply the defeasible right to possession, and constitutional difficulties thereby avoided. This is a clear departure from the rule enunciated in *Hughes v. Washington*, which this Court should now rectify.

2. **The "police power" justification.**

Although both lower courts persuaded themselves that no unconstitutional taking of property was presented by the 1980 Act, the district court's opinion, which the court of appeals essentially adopted, alludes to the equally erroneous notion that the Act could be sustained as a valid police power measure, even if vested rights of property were forfeited in the process. Such an Orwellian notion is at clear odds with virtually every precedent of this Court on the subject, and was explicitly rejected as recently as this Court's

decision in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979):

> In light of its expansive authority under the Commerce Clause, there is no question but that Congress could assure the public free right of access to the Hawaii Kai Marina if it so chose. Whether a statute or regulation that went so far amounted to a "taking", however, *is an entirely separate question.*

444 U.S. at 174 (emphasis added).

The effect of the 1980 Act satisfies every test for a "taking" of property discussed by this Court in *Agins v. City of Tiburon*, 447 U.S. 255 (1980). The Act denies to landowners not pumping groundwater on June 12, 1980 any right to do so in the future. That this will deny to those landowners "economically viable use" of their land and a "fundamental attribute of ownership" is hardly open to question. Moreover, a clearly disproportionate, if not the entire, burden of the Act falls upon that unfortunate category of landowners.

This Court found, in *Kaiser Aetna v. United States*, that an uncompensated "taking" of property resulted from the imposition of a requirement of public access to a private marina. Here, as noted earlier, water companies serving the public have been granted unlimited access to groundwater resources beneath petitioners' lands. The intrusion on property interests condemned by this Court in *Kaiser Aetna* pales in comparison.

The Act, as noted earlier, goes far beyond mere regulation of *the use* of groundwater and takes from private landowners their property interest in groundwater. The lower courts have effectively held that even an outright taking of private property, without compensation, can be justified under the police power. This Court has consistently rejected any such notion, commencing with *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). As the court noted in *Midkiff v. Tom, supra:*

> The Supreme Court has held that merely because the legislature has the power to regulate private property

> does not allow it to take property without just compensation. . . .

Id. 702 F.2d at 797.

Permitting "regulation" to proceed to the point of confiscation is, unfortunately, not the only instance where the lower courts here have departed from this Court's established guidelines. A persistent thread which runs through the "police power" decisions of this Court is that a state may not, directly or indirectly, transfer vested rights from one property owner to another. *See United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950); *Ochoa v. Hernandez y Morales*, 230 U.S. 139 (1913); *Midkiff v. Tom, supra.* Yet the 1980 Act accomplishes precisely that result.

Prior to the 1980 Act, Arizona landowners over common groundwater supplies owned and had the right to draw upon that supply, subject only to the doctrine of reasonable use. By depriving only certain of those landowners of the right to do so in the future, the 1980 Act confers upon others, and principally municipal and private water companies, the right to unfettered use of what previously was the disfavored owners' property. No decision of this Court has ever sanctioned such a result.

II

THE LEGISLATIVE CREATION OF INITIAL ACTIVE MANAGEMENT AREAS DEPRIVES LANDOWNERS THEREIN OF DUE PROCESS OF LAW

As noted earlier, the 1980 Act itself prescribed the initial AMAs which would be subject to its extensive and, in certain instances, confiscatory groundwater regulation. Subsequent AMAs can be created by the director upon a finding, after notice and a hearing and subject to judicial review, that land to be included therein exhibits one of the following characteristics:

> (1) Active management practices are necessary to preserve the existing supply of groundwater for future needs; or,
>
> (2) Land subsidence or fissuring is endangering property or potential groundwater storage capacity; or,

> (3) Use of groundwater is resulting in actual or threatened water quality degradation.

A.R.S. §45-412(A) (App. D, p. D-11). The Arizona legislature thus recognized that the inclusion of land within an AMA should be made on the basis of a particularized evidentiary showing, surrounded by traditional procedural protections.

The legislative creation of initial AMAs, on the other hand, represents a conclusive determination that all of the lands contained therein bear one of these characteristics. The presumption that all these lands satisfy these criteria is irrebuttable and permanent; there is no mechanism provided by which land in an initial AMA can, if circumstances change, be removed from it.

This is not a case where a legislature has enacted a statute of general application which affects the property of a certain class of owners. To the contrary, the 1980 Act represents a legislative declaration that certain specific lands shall forever be presumed to have certain specific characteristics, characteristics which as to all other lands must be shown only by evidence and at noticed hearings. Legislation of this character has been consistently found to be repugnant to the due process clause of the Fourteenth Amendment:

> Certain principles have remained immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual and the reasonableness of the action depends on fact findings, the evidence used to prove the government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.

Greene v. McElroy, 360 U.S. 474, 496 (1959). This rule was reconfirmed in *Vlandis v. Kline*, 412 U.S. 441 (1973), where this Court observed:

> Statutes creating permanent irrebuttable presumptions have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments.

Id., 412 U.S. at 446. *cf. also, Andrews v. Drew Municipal Separate School District*, 507 F.2d 611, 614 (5th Cir. 1975).

This was among the issues which the court of appeals chose not to address, relying instead on the district court's opinion. The district court simply refused to consider the question, relying mainly on its perception that: "this [irrebuttable presumption] doctrine is probably no longer viable in this circuit . . ." *Cherry v. Steiner, supra*, 543 F. Supp. at 1279 (App. B, pp. B-13, 14) (citing a footnote from *de Laurier v. San Diego Unified School District* 588 F.2d 674 (9th Cir. 1978)). A doctrine of constitutional dimensions, enunciated and applied by this Court, has cavalierly been consigned to a judicial scrap heap of the district court's own creation.

III
THE ACT WAS UNCONSTITUTIONALLY VAGUE AND INCOMPLETE AT THE TIME OF ITS ENACTMENT

As has been noted earlier, the central feature of the 1980 Act's regulatory scheme was the legislative creation of four "initial active management areas," which were defined solely as the areas delineated in "maps filed in the Office of the Secretary of State on the effective date of this [Act]." A.R.S. §45-411(B) (App. D, p. D-11). The Act was passed by the Legislature on June 11, 1980, and contained an emergency clause which made the law "immediately operative" upon approval by two-thirds of each house of the Legislature and approval by the Governor. *Ariz. Const.* art. 4, pt. 1, §1. The Act was signed by the Governor into law on June 12. The Act contained no delegation of authority to any official or entity to designate initial active management areas or to prepare maps.

At the time that the bill was passed by the Arizona legislature, on June 11, 1980, there were no maps on file with the Secretary of State. At the time the Governor signed the Act into law, there were no such maps on file. Subsequently, but still on June 12, 1980, some official transmitted maps to the

Secretary of State which defined the lands to be included in the four initial AMAs and subject to the Act's provisions.

Arizona, like many other states, adheres to the common law rule that a statute that is incomplete at the time of its enactment violates due process and is void. The Arizona Supreme Court has articulated the rule in the following fashion:

> An act must be complete in all its terms when it leaves the legislature; so that those charged with the administration of such act are amenable to the courts for failure to put it into effect or for its maladministration, and so that everyone may know by reading the law what his rights are and how it shall operate when put into execution; and the court cannot supply material and essential omissions.

State Compensation Fund v. de la Fuente, 18 Ariz. App. 246, 251, 501 P.2d 442, 447 (1972). *Cf. also, State ex rel. Weiks v. Tumwater*, 66 Wash.2d 33, 400 P.2d 789 (Wash. 1965).

The rule is not a mere "housekeeping" measure; it serves two important and related purposes. Initially, it is ancillary to the rules which circumscribe the delegation of legislative authority. Where a legislature wishes to incorporate into its enactments documentary materials produced by others, it can do so in one of two ways. It may delegate to others the authority to prepare those materials and specify that, when they are prepared or promulgated, they *ipso facto* become part of the legislation. If that option is selected, which it was not in this case, precise standards must be enacted to govern exercise of the delegated authority.

The other option is for the legislature to incorporate the documentary materials by an appropriate reference, and the "completeness" doctrine requires that those materials, as defined in the reference, actually be in existence. A legislative incorporation of documentary materials not yet in existence would be in effect a delegation of legislative authority, and subject to the rules governing that option. The purpose of the "completeness doctrine", which requires that incorporated materials have actual existence, as they are described

in and at the time of the incorporating reference, is to prevent "disguised delegations."

The other purpose is to insure that persons subject to legislative restrictions are apprised of them at the time they come into effect. At the time the 1980 Act was passed, the maps to which it referred had no official existence and a property owner would not have been able to ascertain what land was within the boundaries of an initial AMA.

The district court ruled that any inquiry into this subject was precluded by the "enrolled bill rule". *See Field v. Clark*, 143 U.S. 649 (1892). The court of appeals held this to be plain error but, rather than reverse, conducted its own *de novo* inquiry and concluded that the Act was not void because the maps in questions had somehow come to be filed on "the date of enactment". *Cherry v. Steiner, supra*, 716 F.2d at 692-93. (App. A, p. A-10).

This is a clear misstatement of the rule to be applied. In Arizona, "[A]n act must be complete in all its terms *when it leaves the legislature . . .*" *State Compensation Fund v. de la Fuente*, 18 Ariz. App. 246, 251, 501 P.2d 422, 427 (1972) (emphasis added). By holding that the "completeness doctrine" may be satisfied so long as the incorporated document comes into being by the "date of enactment," this Court opens the door for the very "disguised delegations" which the rule was designed to prevent. That is graphically illustrated by the facts of this case. *After* the Act was signed by the Governor and became law, some administrative official transmitted to the Secretary of State maps which established the initial active management areas. That official had received no legislative delegation to draw, designate or transmit maps, and his actions in doing so were subject to no legislatively defined standards whatsoever.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted this 9th day of FEB., 1984.

Daniel J. McAuliffe
Mark Wilmer
Robert B. Hoffman
SNELL & WILMER
Attorneys for Petitoners

By: Daniel J. McAuliffe
Daniel J. McAuliffe
Counsel of Record

No. 83-___

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

CLIFTON N. CHERRY, et ux., et al.,

Petitioners

v.

WESLEY E. STEINER, et al.

CERTIFICATE OF SERVICE BY MAIL

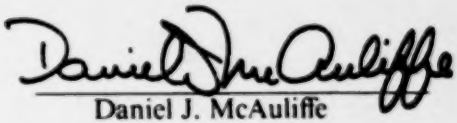
Daniel J. McAuliffe, being a member of the bar of this Court, hereby certifies:

1. That he is an active member of the bar of this Court and that he is counsel of record for the petitioners herein.

2. That the Petition For A Writ of Certiorari To The United States Court of Appeals For the Ninth Circuit submitted herewith, and the Appendices thereto, have been served upon opposing counsel, in accordance with the provisions of Rule 28 of the Rules of this Court, by placing three copies of the same in the United States mail, first class postage prepaid, properly addressed, this 9th day of February, 1984, to:

James W. Johnson, Esq.
Fennemore, Craig, von Ammon,
Udall & Powers, P.C.
1700 First Interstate Bank Plaza
100 West Washington Street
Phoenix, Arizona 85003

3. That the foregoing represents service on all parties required to be served under the provisions of Rule 28 of this Court.



Daniel J. McAuliffe

83-1327

FILED
FEB 10 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-___

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

CLIFTON N. CHERRY, et ux., et al.,

Petitioners

v.

WESLEY E. STEINER, et al.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDICES

Daniel J. McAuliffe
Mark Wilmer
Robert B. Hoffman
SNELL & WILMER
3100 Valley Bank Center
Phoenix, Arizona 85073
Attorneys for Petitioners

APPENDICES
TABLE OF CONTENTS

Appendix A - Opinion of the United States Court of Appeals for the Ninth Circuit .....

Appendix B - Opinion and Order of the United States District Court for the District of Arizona .....

Appendix C - Order of Court of Appeals On Petition for Rehearing .....

Appendix D - The 1980 Arizona Groundwater Management Act (including 1981 Amendments).....

APPENDIX A - OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CLIFTON N. CHERRY, et ux., et al., Plaintiffs-Appellants, v. WESLEY E. STEINER, Et al., Defendants-Appellees	No. 82-5765 D.C. Civ. No. 81-719-PHX OPINION

Appeal from the
United States District Court
for the District of Arizona
Honorable C.A. Muecke, Presiding

Argued and Submitted:
May 11, 1983

BEFORE: PECK,* FLETCHER, AND PREGERSON, Circuit Judges.

FLETCHER, Circuit Judge:

Various Arizona landowners appeal an order of the district court granting summary judgment for defendants in a suit challenging the constitutionality of the Arizona Groundwater Management Act of 1980 (the Act), Ariz. Rev. Stat. Ann. §§ 45-401 to 45-637 (West Supp. 1982). Plaintiffs' central contention is that prior to the enactment of the Act,

*Honorable John W. Peck, Senior United States Circuit Judge for Sixth Circuit, sitting by designation.

they owned the groundwater beneath their property and that the Act's imposition of conditions upon and enjoyment of that groundwater is constitutionally infirm. We have jurisdiction under 28 U.S.C. § 1291 (1976) and affirm.

I

Plaintiffs are several married couples, two corporations, and a private water company. All own land in the State of Arizona within the Upper Aqua Fria Subbasin of the Prescott Initial Active Management Area. They allege that there are substantial quantities of groundwater beneath their several properties and that the Act has diminished the value of the land by taking their ownership in the water without compensation. They further allege that the Act establishes arbitrary classifications which are not rationally related to the goals of the legislation, that the law contains impermissible irrebuttable presumptions, and that the legislation is void for making an impermissible reference to certain extrinsic documents not in existence at the time of enactment of the Act. They seek to enjoin State officials from enforcing the statute and quieting title in their names to the groundwater underlying their properties.

The defendants are Wesley E. Steiner, Director of the Arizona Department of Water Resources, who is charged with enforcement of the Act, and other public officials responsible for the filing of maps, that designate the groundwater management areas established by the legislation. In response to the complaint, the defendants deny that the statutory scheme offends any consitutional provisions or makes any impermissible extrinsic reference. They assert that the law is the result of a valid exercise of the State's police power. They specifically deny that the plaintiffs have any ownership interest, according to Arizona law, in percolating groundwater underlying their realty.

The district court exercised jurisdiction under 28 U.S.C. § 1331 (Supp. IV 1980). Upon cross-motions for summary judgment, the district court determined that there were no

issues of disputed fact and granted defendants' cross-motion for summary judgment. Plaintiffs took this timely appeal.

II

We are indebted to the district court for its careful exposition of the Arizona statutes and case law in respect to rights in groundwater. 543 F.Supp. 1270 (D. Ariz. 1982). We find the district court's analysis persuasive and in most respects adopt the opinion of the district court as the opinion of this court. *See, e.g., Pfizer Inc. v. International Rectifier Corp.*, 685 F.2d 357, 358 (9th Cir. 1982). We find it necessary to address only the following issues in greater detail: (a) whether the Supreme Court's dismissal of the appeal in *Chino Valley v. Prescott*, 457 U.S. 1101, 102 S.Ct. 2897, 73 L.Ed.2d 1310 (1982), *dismissing appeal from* 131 Ariz. 78, 648 P.2d 1324 (1981) *(Chino Valley II)*, forecloses the constitutional challenges raised in this case; (b) whether the district court improperly relied on the law of states other than Arizona and other sources in determining the plaintiffs' constitutionally protected property rights; and (c) whether the Act is void for having made an improper reference to extrinsic documents. We examine these issues in turn.

A

The defendants assert that most of the issues plaintiffs raise have been decided against them by the United States Supreme Court in *Chino Valley II*. In *Chino Valley II*, the Supreme Court summarily dismissed an appeal from the Arizona Supreme Court for "want of a substantial federal question." 457 U.S. at 1101, 102 S.Ct. at 2898. The Arizona Supreme Court affirmed the denial of an injunction to prevent the City of Prescott from withdrawing water from under its land and transporting it elsewhere. As part of its holding it sustained the constitutionality of the Act. *See* 131 Ariz. at 82, 638 P.2d at 1328. The defendants contend that the Supreme Court's summary dismissal of the appeal from the decision constitutes a decision by the Court that the Act is in all relevant respects constitutional and that that deci-

sion is binding on this court as to each of the constitutional claims raised here. We disagree.

A party challenging the constitutionality of a state statute in state court may appeal an adverse holding as of right to the Supreme Court of the United States. *See* 28 U.S.C. § 1257(2) (1976). If the Supreme Court grants plenary review of the state court decision, the decision the Court makes as to the constitutionality of the statute is, of course, binding on this and every other court in the land. *See United States ex rel. Lawrence v. Woods*, 432 F.2d 1072, 1075-76 (7th Cir. 1970). Even a summary disposition by the Supreme Court can have such binding effect but only if the issue was (1) actually decided in the state court, (2) necessary to the state court's decision, (3) presented in the jurisdictional statement, and (4) necessarily decided by the Court in making its summary disposition. *See, e.g., Mandel v. Bradley*, 432 U.S. 173, 176, 97 S.Ct. 2238, 2240, 53 L.Ed.2d 199 (1977); *Hicks v. Miranda*, 422 U.S. 332, 95 S.Ct. 2281, 45 L.Ed.2d 223 (1975). We agree with appellants that the district court should have determined whether any of the constitutional issues raised in this case were addressed in *Chino Valley II* and, if so, whether under *Mandel*, they were decided by the Court.

We conclude, however, that the district court's failure to consider the extent to which *Chino Valley II* constituted a binding precedent does not require reversal. Our independent examination persuades us that none of the constitutional issues raised in this case, whether or not they were addressed in *Chino Valley II*, meet all four *Mandel* criteria.

We first consider the procedural posture in which the relevant issues were raised in *Chino Valley II*. In *Chino Valley II*, the Town of Chino Valley and others sought to enjoin the City of Prescott from withdrawing huge quantities of water from the acquifer beneath land Prescott owned in Chino Valley and from pumping it to customers 17 miles away in Prescott. 131 Ariz. at 79, 638 P.2d at 1325. Prescott moved for dismissal on the ground that Ariz. Rev. Stat.

§ 45-541(A) authorized it to withdraw groundwater and transport the water to its customers. *Id.* at 680, 638 P.2d at 1326. The trail court granted the motion, but gave leave to plaintiffs to amend their complaint to pray for damages. *Id.* Chino Valley did not amend but instead appealed, asserting that the Act was unconstitutional. *Id.*

The Arizona Supreme Court affirmed the dismissal of the injunction. The court went on to state that "appellants' position that the 1980 Act violates the Fifth and Fourteenth Amendments . . . as a taking of private property without due process of law and just compensation cannot be sustained." 131 Ariz. at 82, 638 P.2d at 1328. It is unclear why the Arizona court reached out for the constitutional issues since the trial court had limited its order to a denial of the injunction and specifically authorized an amendment of the complaint to pray for damages. The plaintiffs in *Chino Valley II* then appealed to the United States Supreme Court, raising in the jurisdictional statement not only the issues addressed by the Arizona Supreme Court, but also new ones.

With this background in mind, we proceed to apply the *Mandel* criteria to *Chino Valley II*. The only legal issues that were necessary to the Supreme Court's summary dismissal were the federal constitutional issues, for it is only as to those issues that the *Chino Valley* appellants had a right of appeal to the Supreme Court. *See* 28 U.S.C. § 1257(2) (1976). Moreover, the only federal constitutional issues that the Arizona Supreme Court itself purported to decide were whether the Act violated the due process clause of the fourteenth amendment and whether the Act violated the takings clause of the fifth and fourteenth amendments. *See* 131 Ariz. at 82, 638 P.2d at 1328. Both of these issues were presented to the Supreme Court in the jurisdictional statement in *Chino Valley II*.

Although the issue of the overall constitutionality of the Act under the due process and takings clauses therefore meets three of the four *Mandel* criteria, it fails to satisfy the second, but perhaps most significant, criterion: to wit, that

the issue be necessary to the state court decision. This criterion requires us to look behind what the Arizona Supreme Court said in *Chino Valley II* to determine what actually was necessary to the decision. *See Kastigar v. United States*, 406 U.S. 441, 454-55, 92 S.Ct. 1653, 1661-1662, 32 L.Ed.2d 212 (1972) ("broad language . . . unnecessary to the Court's decision . . . cannot be considered binding authority"). In considering the state court opinion, we are not free, of course, to craft a different analysis by which the state court could have resolved the case before it, but for whatever reasons chose not to use. Nonetheless, we must carefully determine exactly what the state court necessarily decided in order to dispose of the particular case before it and what, being unnecessary to the disposition at hand, was in reality mere obiter dictum.

In *Chino Valley II*, as we have explained, the plaintiff sought only injunctive relief in its complaint. The suit was not one for a declaratory judgment regarding the constitutionality of the Act. Nor did the plaintiff seek to recover damages were the requested injunction to be denied. Thus, despite the broad statements of the Arizona court in its opinion, the only question necessary to the court's disposition of the case was whether a refusal to grant prospective relief against persons withdrawing and transporting water pursuant to the Act violated due process or effected a taking. Since the district court's denial of an injunction did not preclude Chino Valley from recovering damages, affirmance of that denial required nothing more than a determination that refusing to provide injunctive relief from the Act was constitutional. Any broader holding as to the constitutionality of section 45-541(A) of the Act (which provides, *inter alia*, that groundwater withdrawn under certain circumstances may be transported without payment of damages) under the takings and due process clauses was thus not necessary to the disposition of *Chino Valley II*.

For this reason, the Supreme Court's summary dismissal for want of a substantial federal question in *Chino Valley II* is not binding as to the issues raised in the declaratory judg-

ment action before us. Accordingly, the district court was correct in dealing with the merits of the constitutional challenges presented in this case.

B.

The plaintiffs assert that the judgment of the district court should be reversed because the district court erroneously relied on principles of logic and the property rules of other jurisdictions to decide what federally protected rights Arizona property owners had prior to the enactment of the Groundwater Management Act of 1980. We cannot agree.

The due process and takings clauses of the United States Constitution protect "property" rights created by an independent body of law, usually state law. *Paul v. Davis*, 424 U.S. 693, 710-11, 96 S.Ct. 1155, 1164-1165, 47 L.Ed.2d 405 (1976); *see Parratt v. Taylor*, 451 U.S. 527, 529 n.1, 101 S.Ct. 1908, 1910 n. 1, 68 L.Ed.2d 420 (1981). In this case, then, a crucial question is the extent of the property rights to groundwater possessed by Arizona landowners under Arizona law prior to the enactment of the Act.

In making this determination the district court relied primarily on the Arizona Supreme Court's exposition of Arizona groundwater rights in *Chino Valley II*, 131 Ariz. 78, 638 P.2d 1324 (1981), *appeal dismissed*, 457 U.S. 1101, 102 S.Ct. 2897, 73 L.Ed.2d 1310 (1982). See 543 F.Supp. at 1277.[1] After correctly concluding that the Act did not unconstitutionally deprive landowners of their property rights described in *Chino Valley II*, the district court then proceeded to consider whether the description of property rights in the *Chino Valley II* decision was itself "a radical departure from prior law [that did] violence to [the landowners'] property rights." 543 F.Supp. at 1277. This was a completely appropriate question to consider, for a state can-

[1] In that case, the Arizona court stated that "there is no right of ownership of groundwater in Arizona prior to its capture and withdrawal from the common supply and that the right of the owner of the overlying land is simply to the usufruct of the water." *Chino Valley II*, 131 Ariz. at 82, 638 P.2d at 1328.

not validly effect a taking of property by the simple expedient of holding that the property right never existed. *Hughes v. Washington*, 389 U.S. 290, 296-97, 88 S.Ct. 438, 442-443, 19 L.Ed.2d 530 (1967) (Stewart, J., concurring); *see Demorest v. City Bank Farmers Trust Co.*, 321 U.S. 36, 42-43, 64 S.Ct. 384, 388-389, 88 L.Ed. 526 (1944); *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 241, 17 S.Ct. 581, 586, 41 L.Ed. 979 (1897). In deciding that the *Chino Valley II* decision marked no radical change in Arizona rules of property, the court examined Arizona cases prior to *Chino Valley II*, "the experience of other states," and principles of "logic." 543 F.Supp. at 1277-78.

We have examined the Arizona cases and agree with the district court that *Chino Valley II* was not a "startling" and "unpredictable" change in Arizona property law, if it represents any change at all. [2] We do not read the district court's reference to the practice in other states and to logic to serve other than as a means of more fully understanding the rules that had been established under prior Arizona decisional law.

C

Finally, the plaintiffs urge us to reverse the judgment below on the ground that the Act made an invalid reference to extrinsic documents thereby voiding the entire bill and that the district court improperly applied the enrolled bill doctrine to preclude an inquiry into the alleged flaw. Although we conclude that the enrolled bill doctrine was improperly applied in this case, we agree with the district

[2] The question of constitutionality of the *Chino Valley II* decision was raised in the jurisdictional statement before the Supreme Court. However, since the issue was not one of the validity of a statute under the Constitution but one of the validity of a court decision under the Constitution, the question was in the court's discretionary jurisdiction. *See* 28 U.S.C. § 1257(3) (1976). We consider it, like the other issues raised here, as having been left unaddressed by the Court in the summary dismissal.

court that the Act does not suffer the defect alleged by the appellants. [3]

Arizona has adopted the common law rule that a statute is void if its meaning depends on a document not part of the statute, which document does not exist at the time of the enactment of the statute, unless the statute contains a proper delegation of authority to a designated agency. *See State Compensation Fund v. de la Fuente*, 18 Ariz. App. 246, 251, 501 P.2d 422, 427-28 (1973); *see also State ex rel. Weiks v. Tumwater*, 66 Wash.2d 33, 34-35, 36, 400 P.2d 789, 791-92 (1965). In this case, nearly all of the provisions of the Act apply to what are designated as "active management areas." Initial active management areas are defined in Ariz. Rev. Stat. Ann. § 45-411(A), but the definition is simply in terms of "the maps filed in the Office of the Secretary of State on the effective date of this [Act]." Ariz. Rev. Stat. Ann. § 45-411(B) (West Supp. 1982). The Act does not delegate authority to anyone to designate the initial active management areas. Therefore, if on the date of enactment of the Act the maps were not in existence and on file in the Office of the Secretary of State, much if not all of the Act would be void under Arizona law. [4]

The district court did not address plaintiffs' argument on the merits. Rather, the court simply concluded that the enrolled bill doctrine, which "precludes judicial inquiry from going behind the legislation to examine the circumstances under which it was passed," prohibited the court "from inquiring into the manner in which the [Act] was enacted." 543 F.Supp. at 1279. This was error.

While the enrolled bill rule fully applies to challenges raised against the validity of an Arizona statute, *Hernandez*

---

[3] Although this issue is one of state law, it must be addressed since it could avoid the need to address the federal constitutional issues. *See Schmidt v. Oakland Unified School District*, 457 U.S. 594, 595 (1982).

[4] That maps may *now* be on file is irrelevant to this question. The Arizona legislature intended, indeed explicitly provided, that the areas be defined by maps "in the Office of the Secretary on the effective date."

v. Frohmiller, 68 Ariz. 242, 259, 204 P.2d 854, 865 (1949); see also *Field v. Clark*, 143 U.S. 649, 672-73, 680, 12 S.Ct. 495, 497-500, 36 L.Ed. 294 (1892), it has no application to plaintiffs' contention that the bill is void on its face under the rule of *de la Fuente*. The enrolled bill doctrine is intended to forestall judicial inquiry into procedural irregularities occuring prior to the enactment of bills, not inherent defects in bills as enrolled. The challenge here is based not on whether there was truly a vote of the majority in favor of the Act, or whether the Act was reported out of "X" committee as the parliamentary rules of the Arizona legislature may require, but whether the enrolled bill, itself, is void. The bill, as enrolled, refers to certain extrinsic documents. If those documents (maps on file in a particular office) did not exist on the date of enactment, the provisions of the bill dependent on those documents are void. To determine whether the duly enrolled bill is valid, the court must look at the documents from which the enrolled bill itself purports to derive its meaning.

The enrolled bill doctrine, therefore, does not foreclose our inquiry; upon inquiry, however, we conclude that the bill is valid. The plaintiffs state in their briefs that the maps describing the four initial active management areas were, in fact, on file in the Secretary's office on June 12, 1980, the date on which the governor of Arizona signed the bill into law. The landowners conceded as much at oral argument. Consequently, the bill, as enrolled, was not void for an improper reference to extrinsic documents. [5]

[5] To the extent that plaintiffs argue that the bill was invalidly enacted because the legislature had only working copies, not final maps, before it when it voted on the bill, the challenge falls within the enrolled bill doctrine and is not within the jurisdiction of the courts to redress. Based on separation of powers considerations, the doctrine precludes judicial inquiry into procedural defects that take place before the executive has signed the bill. *See Field v. Clark*, 143 U.S. 649, 672 (1892) ("respect due to coequal and independent departments requires the judicial department . . . to accept . . . all bills authenticated" by leaders of both houses and by the executive as having been validly enacted).

III

We affirm the judgment of the district court sustaining the validity of the Act.

AFFIRMED.

APPENDIX B - OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CLIFTON N. CHERRY, et al., Plaintiffs, vs. WESLEY E. STEINER, et al., Defendants.	No. CIV 81-719 PHX CAM OPINION and ORDER

With their suit, plaintiffs seek a ruling that the 1980 Arizona Groundwater Code violates due process and equal protection in contravention of the fifth and fourteenth amendments to the United States Constitution. Their action prays for an order enjoining State officials from enforcing the statute and quieting title in their names to the groundwater underlying their properties.

The plaintiffs are several married couples, two corporations and a private water company, all of whom own land within the Upper Aqua Fria Subbasin of the Prescott Initial Active Management Area. They allege that there are substantial quantities of groundwater underlying their several properties, and that the legislation has diminished the value of the land by taking their ownership in the water without compensation. They further allege that the Code establishes arbitrary classifications which are not rationally related to the goals of the legislation, that the law contains impermissible irrebuttable presumptions, and that the legislation was passed in a manner which constitutes an impermissible delegation of legislative responsibility to an unauthorized third party.

The defendants are Wesley E. Steiner, Director of the Arizona Department of Water Resources, who is charged with enforcement of the statute, and other public officials responsible for the filing of maps, which designate the groundwater management areas established by the legislation.

In response to the complaint, the defendants deny that the statutory scheme offends any constitutional provisions. They assert that the law is the result of a valid exercise of the State's police power. They specifically deny that the plaintiffs have any ownership interest, according to Arizona law, in percolating groundwater underlying their realty.

The lawsuit is a matter in controversy arising under the Constitution of the United States, conferring this Court with jurisdiction pursuant to 28 U.S.C. §1331. This Court is also empowered to render a declaratory judgment, if appropriate, by the parties' invocation of 28 U.S.C. §2201.

For the reasons set forth below, the Court finds and concludes that there are no material facts in dispute, and that the legislation is a permissible exercise of the State's police power and does not offend the Constitution. Accordingly, the defendants' Motion for Summary Judgment is granted, while the plaintiffs' Motion for Summary Judgment is denied.

Groundwater in Arizona

During the 1930's, the shortage of groundwater in the State became a matter of concern. It was not until 1948 though, that legislation was passed dealing with the problem. The Groundwater Code of 1948 was promulgated under threat from the United States Department of Interior that the Central Arizona Project would not be built unless Arizona took steps to regulate its groundwater. At the time, the Code was viewed as a temporary measure. Nevertheless, with minor changes it remained the law until the 1980 law was enacted.

The Code of 1948 authorized the State Land Commission to designate "critical groundwater areas," within which there would be no further expansion of agricultural irrigation with groundwater. Existing agricultural wells were permitted to continue pumping.

The constitutionality of the Code was upheld in *Southwest Engineering Co. v. Ernst*, 79 Ariz. 403, 291 P.2d 764

(1955). In so doing, the Arizona Supreme Court rejected allegations similar to the ones that have been raised in this suit — that the 1948 Code took property without compensation, was violative of equal protection and was an unauthorized delegation of legislative responsibilities.

Previously, in a rehearing of a decision which held that all groundwater was subject to prior appropriation, the Arizona Court had reinstituted the common law rule, in holding that a landowner had the right to the reasonable use of the groundwater underlying his property. *Bristor v. Cheatham, (Bristor II)*, 75 Ariz. 227, 255 P.2d 173 (1953).

The temporary nature of the 1948 Code was underscored in the *Jarvis* trilogy, which attempted mediation, among special interests for the State's finite bank of groundwater. In *Jarvis v. State Land Department (Jarvis I)*, 104 Ariz. 527, 456 P.2d 385 (1969), the City of Tucson was enjoined from transporting water to the city for municipal use from wells in a critical groundwater area. The injunction was modified in *Jarvis II*, 106 Ariz. 506, 479 P.2d 169 (1970), so as to allow the city to purchase land within the critical groundwater area, retire the land from cultivation and irrigation, and transport groundwater from the farmlands to the municipal service area in an "amount equal to the annual historical maximum use upon the lands so acquired." 106 Ariz. at 511, 479 P.2d at 174.

Jarvis II exemplified the flexibility in the reasonable use doctrine by permitting the transportation of groundwater off of the land from which it is pumped for beneficial use elsewhere. In *Jarvis III*, 113 Ariz. 230, 233, 550 P.2d 227, 230 (1976), the Court interpreted "annual historical maximum use" to mean "consumptive use," reducing the amount available to the City of Tucson by approximately 50 percent.

The transportation of mined groundwater was again addressed in *Farmers Investment Co. v. Bettwy*, 113 Ariz. 520, 558 P.2d 14 (1976). The court held that the doctrine of reasonable use prevented the transportation of water away from "the land from which the groundwater is being

pumped," where the supply of other groundwater users who overlie the common source of supply is being lowered and depleted. Recognizing the potential economic impact of such a decision, the opinion stated that the courts would not prefer one economic interest over another, but that "the Legislature is the appropriate body to designate when and under what circumstances such economic interest will prevail." *Id.*, 113 Ariz. at 527, 588 P.2d at 21.

In its next session, the Arizona Legislature passed a bill which provided that one could file an application for a Certificate of Exemption for the amounts of groundwater then being used by that person or entity. These 1977 amendments to the Groundwater Code of 1948 further provided that once an exemption was obtained, the transporter could transport as much water off the property as was originally being used thereon, without the threat of injunction. The transporter could be sued for damages, however, if it damaged other landowners who owned land over the same groundwater basin or aquifer.

The 1977 amendments were challenged on the grounds that such a scheme constituted the taking of property without just compensation and that restriction of the remedy available violated the principle of separation of powers. These arguments were rejected and the constitutionality of the legislation was upheld in *Town of Chino Valley v. State Land Department*, (*Chino Valley I*), 119 Ariz. 243, 580 P.2d 704 (1978).

The 1977 amendments recognized the necessity of a comprehensive overhaul of the Groundwater Code. To this end, the legislation established the Groundwater Management Study Commission and provided that this Commission would draft a recommendation which would become the State's Groundwater Code unless the legislature passed its own bill before the end of 1981.

The legislature recognized that no major legislation could be passed over the objection of any major class of water users. Consequently, the Study Commission was made up of

representatives of the major types of water users: agricultural, mining, urban and Indian interests. The Commission held public hearings and workshops, and solicited input through mailings.

The Commission developed a Draft Report, which provided a proposal for comprehensive groundwater management. The two agricultural representatives on the Commission dissented.

In light of the dissents and the objections of irrigators at the public hearings, the Commission decided to make further revisions in hopes of bringing agriculture into the group supporting the bill. Negotiations with agricultural interests were conducted, resulting in the production of "Concepts for Agreement Integrated Package." The Commission accepted the Concepts package and, without dissent, directed the package be put into statutory language.

On June 5 and 6, 1980, the Commission and both houses of the legislature held public hearings on the bill. On the 6th, the Commission recommended the amended draft to the legislature by a vote of 19 ayes, 1 no, and 4 abstentions. On June 9, hearings were held by committees of the joint legislature. The bill was passed by the legislature in special session on June 11, and signed into law by the Governor the next day.

The Groundwater Code of 1980

The Code commences by recognizing that the people of Arizona are very dependent on groundwater as a source of their water supply. Also acknowledged are the facts that the withdrawal of groundwater is and has been in great excess of the safe annual yield and that this threatens the State's welfare. A.R.S. §45-401. (All subsequent references to A.R.S. sections will list only the section number.)

In response, the Code announces its intentions as seeking to conserve, protect and allocate groundwater and provide a framework for management and regulation of the

withdrawal, transportation, use, conservation and conveyance of rights to use the groundwater. §45-401 B.

One of the principal features of the legislation is the establishment of Active Management Areas (AMA), §45-402(2), which are geographic areas where groundwater supplies are imperiled. In these areas, groundwater use is subject to close scrutiny and intensified regulation. An AMA encompasses a relatively distinct hydrological body or related body of water, termed a groundwater basin or sub-basin. §45-412(B).

The Code established four initial AMA's: Tucson, Phoenix, Prescott, and Pinal. §45-411(A). The plaintiffs in this suit are landowners within the Prescott AMA, which includes the Little Chino and Upper Agua Fria Subbasins. Plaintiffs correctly assert that there are no administrative means for modifying the boundaries of the initial AMA's. This was legislatively accomplished and can be modified only by the legislature.

The Groundwater Code also provides for the future classification of additional AMA's. §45-412. A subsequent AMA could be established only after hearings were held, and any such decision would be judicially reviewable.

An elaborate system of management of groundwater in the AMA's is established. Uses of groundwater in the areas are permitted to continue and are called "grandfathered rights." There are three categories of grandfathered rights: irrigation rights, §45-465, Type 1 non-irrigation rights, §45-463, and Type 2 non-irrigation rights, §45-464. An irrigation right is measured in acres of land which may continue to be irrigated and is determined by historical use. Holders of irrigation rights are encouraged to convert their land to non-irrigation uses. §45-472. The right to use groundwater for a non-irrigation purpose by virtue of having retired irrigated land is a Type 1 non-irrigation right. §45-463.

Type 2 non-irrigation rights are all remaining non-irrigation uses of groundwater in existence when an AMA is designated, e.g., mines, and industry. Withdrawal from

domestic wells and withdrawals by cities, towns and private water companies from outside their service areas or within their service areas pursuant to a certificate of exemption is considered to be within Type 2 uses. §45-464(C).

Service areas are those areas being served water by a public or private water company. §45-402 (25). Municipalities and water companies may withdraw enough water within their service areas to serve their customers, although they are restricted from extending their service areas and the types of services that they provide. §45-493(A) and (B).

The Code also established two irrigation non-expansion areas, which are not subject to active management, but in which new land may not be irrigated. These areas have been determined to be capable of supporting existing irrigation uses at current rates of withdrawal, but could not safely support expanded withdrawals. §45-431.

Within AMA's, the Code generally prohibits new uses of groundwater. §45-491, *et seq.* While new withdrawals for domestic uses are permitted, §45-492, no additional industrial uses will be allowed, except where designed to require maximum conservation, §45-497. Industrial users will be required to purchase and retire irrigated lands if available. *Id.* Further, there is a prohibition against putting new land into irrigation with any kind of water. §45-493(C).

Recognizing that grandfathered rights or the purchases from water companies within service areas may not provide sufficient water, a system for obtaining permits to withdraw additional quantities of water has been established. §45-512-19. The permits may be issued only for limited purposes and after certain requisites have been satisfied.

The Code contains strong management tools. Subdivided lands within an AMA may be sold only after the developer has demonstrated that there is sufficient water to satisfy the needs in the subdivision for the next 100 years. §45-576. In addition, a subdivider must show that the projected water use is consistent with the management plans for the AMA, which have been established by the Director of the Depart-

ment of Water. *Id.* The assurance of a supply of water need be demonstrated despite the fact that the subdivision will be served by a water company, although if the subdivision is to receive Central Arizona Project water, the director may deem the water assurance requirement met. §45-576(E).

The problem of transportation of groundwater has also been addressed by the legislation. In *Farmers Investments*, 113 Ariz. 529, 558 P.2d 14 (1976), the Arizona Supreme Court held that the City of Tucson and Anamax Mining Company could be enjoined from withdrawing groundwater from lands that they owned and transporting the water to land other than from which the waters are taken. However, the Code permits such transportation of amounts of water equal to the historical use. The new law does recognize the reasonable use doctrine and provides that if such mining and transportation does lower the water table so as to diminish the water available to another landowner whose land overlies the common water table, the transporter is subject to damages. §45-544(2). While transportation of groundwater is regulated from areas both within and without AMA's, transportation from within AMA's is regulated more strictly and depends upon the use for which the water is intended and the type of water rights possessed by the party withdrawing the groundwater. §§45-541-44.

Chapter 1 of the groundwater legislation creates the Department of Water Resources, §45-102, within which is the Arizona Water Commission. §45-121. The director of the department succeeds to the power previously held by the Groundwater Commission. Presently, the director is Wesley Steiner, a defendant in this suit. The director is required to promulgate and implement groundwater management plans.

The Code provides for five management periods: four, ten-year periods and one, five-year period. §§45-564-68. The director is to develop a plan for each AMA for each period. In successive periods, the conservation requirements become progressively more stringent. Throughout the course of the management program, groundwater use is to be cur-

tailed through the imposition of irrigation water duties, §45-402, and increased conservation by cities and industry. §45-564-68.

Management programs in the future provide for augmentation of water in each AMA and the imposition of withdrawal fees on users. *Id.* Further, the State will be allotted funds for the purchase and retirement of grandfathered irrigation rights and will exercise control over the location or redrilling of wells. *Id.*

In summary, probably the biggest innovation in the Code is the establishment of AMA's. Previous water uses are permitted to continue although through a series of controls and regulation, increased use is prohibited, and users are encouraged to convert land to uses less dependent on groundwater. Transportation of groundwater and alienation of water rights are dealt with in a manner that also encourages conservation and putting groundwater to its most efficient use. The Code creates a state agency charged with the management of groundwater in Arizona.

The Cross-Motions for Summary Judgment

The parties have filed Cross-Motions for Summary Judgment. They allege, and the Court agrees, that there are no issues of disputed fact. Plaintiffs seek a determination that the Code is unconstitutional on the grounds that the legislation constitutes a taking of property without just compensation, that it contains impermissible irrebuttable presumptions, that its classifications violate the equal protection clause, and that the Code makes an impermissible delegation of legislative power to an unrestrained third party. Plaintiffs further seek an order quieting title in the groundwater underlying their properties.

With their motion, the defendants seek a ruling that the legislation is constitutional and was a valid exercise of the State's police powers.

DUE PROCESS TAKING

The principal argument advanced by the plaintiffs is that the Code takes their property without due process of law. This argument is premised upon the assumption that a landowner owns the groundwater that underlies his property. Plaintiffs argue that the imposition of any conditions upon their use and enjoyment of their groundwater by state action is constitutionally infirm.

The death knell for this argument sounded after this suit was filed, when the Arizona Supreme Court announced its decision in *Town of Chino Valley v. City of Presoctt*, 131 Ariz. 78, 638 P.2d 1324 (1981), *appeal dismissed*, _____ U.S., _____, 102 S.Ct. 2897, 73 L.Ed.2d 1310 (1982). That case, *Chino Valley II*, raised essentially the same issues that have been presented to this Court. Most importantly, the decision explicitly held that there is no right of ownership in groundwater prior to its capture. A landowner whose land overlies groundwater has only the right to use of the water, but maintains no proprietary interest in the actual water. 131 Ariz. at 82, 638 P.2d at 1328.

Federal courts look to state law for the definition of property rights. 28 U.S.C. §1652. Additionally, a federal tribunal, when interpreting state law is bound by the interpretation of the law by that state's courts. *Erie Railroad Company v. Tompkins*, 304 U.S. 64, 78, 58 S.Ct. 817, 822, 82 L.Ed. 1188 (1938). The Arizona Supreme Court has stated that there is no propriety interest in percolating groundwater. That court has further declared that any language in previous decisions, which suggested that there was a property interest in groundwater, was only dicta. 131 Ariz. at 81, 638 P.2d at 1327.

The only interpretation of Arizona law open to this Court is that a landowner has no interest in underlying groundwater prior to its capture. Without an interest in the percolating water, the plaintiffs may not assert a wrongful taking of their property; *Chino Valley II* emasculates their due process argument.

The plaintiffs have attempted to circumvent the impact of *Chino Valley II* by alleging that the Supreme Court's decision, itself, has unconstitutionally destroyed property rights. They rely on some old case law for the proposition that when a court decision works an unpredictable change in state law, this gives rise to a federal question as to whether the court has impermissibly taken property without due process. *Chicago B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1896); *Pease v. Peck*, 59 U.S. (18 How.) 595, 15 L.Ed. 518 (1855).

Plaintiffs allege that previous Arizona decisions have established a landowner's proprietary interest in the groundwater underlying the property *e.g.*, *Howard v. Perrin*, 8 Ariz. 347, 76 P.2d 460 (1904), *aff'd.* 200 U.S. 71 (1906). They argue that the *Chino Valley II* decision was a radical departure from prior law and thus does violence to their property rights.

This argument must fail for several reasons. Initially, the status of the law in Arizona regarding groundwater as private property was not as clear as the plaintiffs would have this Court believe. In *Southwest Engineering Company v. Ernst*, 79 Ariz. 403, 291 P.2d 764 (1955), the Arizona Supreme Court analyzed its prior decisions dealing with groundwater, including *Southwest Cotton*, *supra*, and *Bristor II*, *supra*, cases upon which the plaintiffs base their contentions of proprietary rights in groundwater. The *Ernst* court found that while prior decisions may have decided that landowners had an interest in water underlying their property, that those cases dealt only with disputes between individuals and that "the question was left open as to the right of the state against individuals to regulate the consumption of water in the interest of the general welfare." 79 Ariz. at 408, 291 P.2d at 767. Recognizing the weighty public concern over the depletion of groundwater sources, the *Ernst* court concluded by stating: "we cannot say that the exercise of such choice, controlled by considerations of social policy which are not unreasonable, involves a denial of due process." 79 Ariz. at 410, 291 P.2d at 769. In ren-

dering its decision, the Court in *Ernst* rejected a due process taking argument similar to this one.

Besides recognizing that the future use of groundwater was a matter of legislative concern, the decisions upon which the plaintiff rests are not as unequivocal as plaintiffs' protests. One of the state's preeminent authorities on water law has stated this about the *Bristor II* decision,

> Bristor did not accept the doctrine of 'absolute ownership,' and appropriation theory was expressly rejected by the court on rehearing. The court distinguished correlative rights doctrine and put it aside in favor of 'reasonable use' doctrine, which in operational terms includes exercise of the state's police power. . . . Clark, R.E., *Groundwater Management Law and Local Response*, 6 Ariz. L. Rev. 178, 197 (1964-65).

In the *Bristor II* decision, the Court also recognizes that the overlying owner's right is to the *use* of the water, not the water itself. 75 Ariz. at 234, 255 P.2d at 180.

Not only is the plaintiffs' reliance upon selected passages of Arizona case law misplaced, the plaintiffs, in asserting an absolute right to ownership of groundwater, ignore the actions of legislatures and courts throughout the country. Water, particularly in the West, is becoming increasingly in demand and valuable. Recognizing the potential public shortages of water, legislatures, through the use of their police power, have passed legislation restricting private use. This Court is unaware of any such police power actions which have been found unconstitutional. [1]

Finally, the plaintiffs' assertions of ownership of percolating groundwaters must fail on the basis of logic.

---

[1] *See Crookston Cattle Co. v. Minnesota Department of Natural Resources*, 300 N.W. 2d 769, 774 (Minn. 1980); *Village of Tequesta v. Jupiter Inlet Corp.*, 371 So. 2d 663, 670 (Fla. 1979), *cert. denied*, 444 U.S. 965 (1979); *Baeth v. Hoisveen*, 157 N.W. 2d 728, 732 (N.D. 1968); *Williams v. City of Wichita*, 190 Kan. 317, 374 P.2d 578 (1962), *appeal dismissed*, 375 U.S. 7 (1963).

Groundwater is "water under the surface of the Earth regardless of the geological structure in which it is standing or moving. It does not include water flowing in underground streams with ascertainable beds and banks." §45-101(4). Groundwater knows no boundaries and may flow under the land of several landowners. It would be impossible to accord to each overlying landowner the right to the underlying, percolating water, as withdrawal by one owner necessarily interferes with the enjoyment of the like privilege of other owners.

Plaintiffs' claims of an unconstitutional taking of their property is based upon a misreading of Arizona law. Furthermore, the claim ignores the experience of other states and is logically unsound. The State has the power, within constitutional limitation, to impose such restraints upon private rights as are necessary for the common good.

IRREBUTTABLE PRESUMPTION

The plaintiffs also argue that the legislation establishes irrebuttable presumptions in its categorization of Active Management Areas (AMA's) and is thus violative of due process. They note that the legislation contains no explanation as to why the four AMA's were so designated. They point out that in order to designate a subsequent AMA, the State would need to make certain findings and hold hearings. Plaintiffs reason that because the legislation contains no findings in regard to the initial AMA's, that this denomination constitutes an irrebuttable presumption.

While it is true that the new statute itself is silent as to the basis for the AMA designations, the legislative history is full of support for this legislative categorization. Initially, it need be noted that the four initial AMA's account for 69 percent of the total groundwater overdraft in the state and include 80 percent of the State's population. Looking toward the future, the State expects its largest population increases within these areas.

Despite such solid factual footing, the Code cannot be threatened by an irrebuttable presumption argument, as this

doctrine is probably no longer viable in this circuit, *deLaurier v. San Diego Unified School District*, 588 F.2d 674, 683, n. 16 (9th Cir. 1978). Additionally, the doctrine never applied to legislative decisions regulating the private sector of the economy. *Weinberger v. Salfi*, 422 U.S. 749, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975); *Mourning v. Family Publication Service, Inc.*, 411 U.S. 356, 93 S.Ct. 1652, 36 L.Ed.2d 318 (1973).

Although plaintiffs argue irrebuttable presumption, their lack of a reply to the defendants' reference to these cases seems to recognize the inevitable failure of such position.

DELEGATION OF LEGISLATIVE AUTHORITY

It is next alleged that the legislature abdicated its non-delegatable responsibility, when it enacted legislation which incorporated maps of the four initial AMA's, which had not yet even been prepared. Plaintiffs argue that the legislature and the Governor could not have had any idea of what they were enacting if they did not have these maps before them at the time of their respective acts. Further, plaintiffs contend that it is an impermissible delegation of the legislative responsibility to permit an unauthorized third party, the State Water Commission, to prepare such a critical part of the legislation.

The defendants respond by avowing that the legislature and the Governor were working from smaller, more compact maps, with the identical boundaries as set forth on the maps later filed with the Secretary of State.

Regardless of the situation, such inquiry by a court is prohibited by the Enrolled Bill Doctrine. This policy precludes judicial inquiry from going behind the legislation to examine the circumstances under which it was passed. *See e.g., Field v. Clark*, 143 U.S. 649, 12 S.Ct. 495, 36 L.Ed. 294 (1892). Arizona courts have also recognized that the separation of powers doctrine, and the respect the judiciary should give to the enactments of a coordinate branch of government, prevent them from examining alleged procedural

defects or irregularities in the passage of legislation. *Hernandez v. Frohmiller*, 68 Ariz. 242, 204 P.2d 854 (1949).

The Enrolled Bill policy prevents this Court from inquiring into the manner in which the Code was enacted.

DUE PROCESS AND EQUAL PROTECTION

Plaintiffs have alleged that a variety of provisions of the Code are arbitrary and not rationally related to legitimate legislative goals, rendering the legislation violative of the equal protection and due process clauses.

Legislative acts adjusting the burdens and benefits of economic life come to the courts with a presumption of constitutionality. *Hodel v. Indiana*, 452 U.S. 323, 101 S.Ct. 2376, 2382, 69 L.Ed. 2d 4 (1981). Plaintiffs have the burden of overcoming this burden. They must establish that the legislature's classifications are purely arbitrary and not rationally related to a legitimate legislative purpose. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 96 S.Ct. 2882, 49 L.Ed.2d 752 (1976).

The plaintiff's attack on the Code is broad-based. They argue that the classification of certain areas as AMA's is discriminatory, that the boundaries for these areas are not rationally justifiable, and that the distinctions drawn between different types of water users is irrational. Plaintiffs contend that there is no justification for distinction between private and public water companies, or between mining and other industrial use permits. They allege that the implementation of irrigation water duties will discriminatorily impact upon them.

It is not this Court's task to weigh the wisdom of the legislature's work. Whether a more attractive alternative exists is not of concern, but only whether there exists a rational basis for the Code's provisions. For each and every suggestion of constitutional infirmity made by the plaintiff, the defense has provided a rational explanation for that provision.

The designation of Active Management Areas was based upon the recommendation of the Arizona water commission that these areas required active management so as to meet a goal of safe-yield. The commission held public hearings and solicited public input through mailings. It considered the works and opinions of experts in the fields of demography and hydrology. It established four AMA's which account for 69 percent of the State's groundwater overdraft and 80 percent of the State's population. The three AMA's with safe yield goals account for 45 percent of the overdraft and 77 percent of the population in Arizona. The Arizona Department of Economic Security has forecasted that the State's population will explode most profoundly in the area encompassed by the Phoenix, Tucson and Prescott AMA's.

Pursuant to the 1948 Groundwater Code, ten Critical Groundwater Areas were designated. Every previously designated Critical Groundwater Area was included in either an AMA or an Irrigation Non-Expansion Area under the new Act. The Arizona Supreme Court found that the establishment of Critical Groundwater Areas was constitutional in *Southwest Engineering Co. v. Ernst*, 79 Ariz. 403, 412, 291 P.2d 764, 770 (1955), under a similar constitutional analysis.

The defendants have documented the existence of a sound hydrological basis for the boundaries which establish AMA's. In any case, the equal protection clause does not apply to the differing treatment accorded geographical areas. *McGowan v. Maryland*, 366 U.S. 420, 427, 81 S.Ct. 1101, 1105, 6 L.Ed.2d 393 (1961).

The plaintiffs claim that the distinctions made between the types of water users is discriminatory. A statute is not invalid because it draws distinctions between classes and treats those classes differently, so long as the distinctions are based upon legitimate differences between the classes and bear a reasonable relationship to the purpose of the legislation.

According to depletion or consumptive use rates, irrigation consumes 89 percent of the total water in the state. The

increasing competition between farming, mining and urban uses for groundwater was recognized in the *Jarvis* trilogy. Arizona courts have long recognized that reconciling these competing uses was a task for the legislature. *Ernst*, 79 Ariz. at 411, 291 P.2d at 770. Water users have long been on notice that the State would at some point have to intervene to regulate prospective uses of a dwindling resource in the face of increased use. The Code does so in a structured principal manner with the state's general welfare as its talisman.

The plaintiffs have claimed that the Code in several places prefers municipal water companies over private companies and is therefore violative of equal protection. Courts have upheld the differentiation between private and public utilities where such distinction is justified by the aims of the legislation. *Springfield Gas and Electric Co. v. City of Springfield*, 257 U.S. 66, 42 S.Ct. 24, 66 L.Ed. 131 (1921); *Southern California Edison Co. v. United States*, 415 F.2d 758, *cert. denied*, 396 U.S. 957, 90 S.Ct. 427, 24 L.Ed.2d 420 (9th Cir. 1969).

The distinctions in the Code are clearly justified. Private companies are frequently formed by subdividers to provide services for their developments. In some instances, they are under-financed, and generally, the motives of the developer are not so much publicly oriented as they are to assist in the sale of lots in the subdivision. Public companies frequently are forced to later take over private companies. Further, private companies are far more constrained than public companies in the raising of revenues through bonds.

One of the primary goals of the Code is to prohibit urban development in areas where adequate water supplies do not exist. Public companies are more able to plan for the future than their private counterparts. They have a sounder economic base and a legal obligation to plan for and assure adequate water supplies. Any distinctions made between these entities by the Code are completely rational and therefore justified.

Also heard, is the complaint that mining receives a different treatment from other industrial water users in the obtaining of use permits. Defendants point out that unlike most other water users, mining companies do not have any flexibility in where they locate; they mine where the ore is available. Furthermore, mining accounts for only 2.7 percent of the total groundwater pumping in the State, while making a very significant contribution to the economy. Finally, the mining industry's use of water is the least intensive per acre of land of any economic enterprise in the State outside of stock grazing. The defendants properly point out that any distinctions conferred on the mining industry in its obtaining use permits is certainly justified by the unique position it occupies.

The quantity of water which may be used by irrigators will be limited by irrigation water duties to be set by the Director of the Department of Water Resources. These determinations are to be made upon an analysis of each individual farm unit. §45-402.10. Such an analysis may take into account the unique situation of each tract of land and is to be based upon historical use. Irrigators, unlike other water users, have the availability of variances, flexibility accounts and credits, to mitigate hardships that water duties may occasion. Additionally, irrigators are the only group of water users for whom conservation is not mandatory.

Plaintiffs, however, have argued that the system of water permits is discriminatory. This argument, like their others, must fail. The *Ernst* case established that the legislature could validly prohibit the irrigation of new land. Presently, the irrigation of crops in the State consumes more than the entire dependable water supply of the State. The legislature, therefore, has a valid basis, indeed responsibility, for limiting the development of land for new irrigation.

The State has not prohibited existing uses. Instead, it has provided that all existing irrigation may continue subject only to the imposition of use duties designed to promote reasonable groundwater conservation. The state has

designed a rational method of attaining a legitimate governmental goal. The Code is not constitutionally discriminatory.

MOTION TO STRIKE

Plaintiffs have submitted a Motion to Strike many of the affidavits and exhibits that the defendants have introduced in support of their Cross-Motion for Summary Judgment. They allege that many of the documents are irrelevant or immaterial, that they have not been authenticated or that the materials were never considered by the legislature. Plaintiffs also allege that some of the affidavits should be stricken in that they are not made on the basis of personal knowledge. Finally, they present an estoppel argument, contending that because they voluntarily withdrew a notice of deposition in the face of a defense motion for protective order, that none of the information sought from the deponent should be permitted to be introduced.

During the discovery stages of this case, plaintiffs noticed the deposition of Kathleen Ferris, Chief Counsel for the Department of Water Resources and past Executive Director of the Groundwater Management Study Commission. The defendants filed a Motion for Protective Order, stating that Ferris was a member of the defense counsel team in this lawsuit, that some of the anticipated questioning was protected by the attorney-client privilege, and that the information sought by the plaintiffs was irrelevant under the Enrolled Bill Doctrine. Upon receipt of the Motion for Protective Order, plaintiffs voluntarily withdrew their notice of deposition, without the Court ever acting.

Plaintiffs now argue that defendants should not be permitted to introduce evidence that they earlier argued was irrelevant under the Enrolled Bill Doctrine. They contend that the consideration of such evidence would offend notions of estoppel.

Initially, it must be remembered that the Court was never forced to face the request for protective order. Plaintiffs voluntarily abandoned their intent to depose Ferris, thereby

mooting the Motion for Protective Order. The Court knows of no doctrine that prohibits a party from arguing in the alternative at various states of the litigation. There certainly was no law of the case established previously.

Furthermore, it would be ridiculous to allow plaintiffs to put the rationality of the legislation of the Code in question, and then tie the hands of the defendants behind their backs by prohibiting them from presenting a case for its rational basis. The Motion to Strike on the basis of estoppel is denied.

Parts of the documentation by the defendant was introduced in response to the plaintiffs' argument that there was an impermissible delegation of legislative authority in the preparation, passage and signing of the legislation. Although defendants have posited that such an inquiry is barred by the Enrolled Bill Doctrine, they have presented evidence for the purpose of showing that the Code followed proper legislative channels in its preparation and adoption. The Court has agreed that judicial inquiry into the legislative process is impermissible. Consequently, none of the materials presented by the defendants in this regard have been considered. The plaintiff's Motion to Strike is, therefore, granted to the extent that it sought exclusion of materials which go behind the bill to show that the legislation was properly drafted and passed.

The other materials in support of the defendants' Motion for Summary Judgment may properly be considered. The plaintiffs have opened the door regarding whether there existed a rational basis for the Groundwater Code. The defendants have responded with the materials on which the legislation is based. The fact that the legislature did not consider each page of the studies and reports is not grounds for holding such information inadmissible. The materials are relevant and material. The foundation objections are so vague as to not constitute proper objections. The authentications objections are legally frivolous. The Motion to Strike on these grounds is denied.

Based upon the foregoing discussion of the facts and law, IT IS ORDERED that the defendants' Cross-Motion for Summary Judgment is granted, while the plaintiffs' Cross-Motion for Summary Judgment is denied.

IT IS FURTHER AND FINALLY ORDERED that the plaintiffs' Motion to Strike is granted in part and denied in part.

DATED this 19th day of July 1982.

C. A. Muecke
Chief Judge

APPENDIX C - ORDER OF COURT OF APPEALS ON PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CLIFTON N. CHERRY,
et ux, et al.,

Plaintiffs-
Appellants,

vs.

WESLEY E. STEINER,
et al.,

Defendants-
Appellees.

No. 82-5765

ORDER

Before: PECK,* FLETCHER, and PREGERSON, Circuit Judges.

The panel in this case has voted to deny the petition for rehearing.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion. Fed. R. App. P. 35(b).

The suggestion for rehearing en banc is hereby rejected.

*Honorable John W. Peck, Senior United States Circuit Judge for the Sixth Circuit, sitting by designation.

APPENDIX D - THE 1980 ARIZONA GROUNDWATER MANAGEMENT ACT (INCLUDING 1981 AMENDMENTS)

ARTICLE 1. ADMINISTRATION

§ 45-401. Declaration of policy

A. The legislature finds that the people of Arizona are dependent in whole or in part upon groundwater basins for their water supply and that in many basins and sub-basins withdrawal of groundwater is greatly in excess of the safe annual yield and that this is threatening to destroy the economy of certain areas of this state and is threatening to do substantial injury to the general economy and welfare of this state and its citizens. The legislature further finds that it is in the best interest of the general economy and welfare of this state and its citizens that the legislature evoke its police power to prescribe which uses of groundwater are most beneficial and economically effective.

B. It is therefore declared to be the public policy of this state that in the interest of protecting and stabilizing the general economy and welfare of this state and its citizens it is necessary to conserve, protect and allocate the use of groundwater resources of the state and to provide a framework for the comprehensive management and regulation of the withdrawal, transportation, use, conservation and conveyance of rights to use the groundwater in this state.

§ 45-402. Definitions.

In this chapter, unless the context otherwise requires:

1. "Accounting period" means the calendar year, except such other twelve-month period as may be otherwise agreed upon by the director and the owner of a farm or a district on behalf of its landowners.

2. "Active management area" means a geographical area which has been designated pursuant to article 2 of this chapter as requiring active management of groundwater.

3. "Animal industry use" means the production, growing and feeding of livestock, range livestock or poul-

try, as such terms are defined in § 24-101. Animal industry use is included in the term and general treatment of industry in this chapter, unless specifically provided otherwise.

4. "City" or "town" means a city or town incorporated or chartered under the constitution and laws of this state.

5. "Convey" means to transfer the ownership of a grandfathered right from one person to another.

6. "Effluent" means water which, after being withdrawn as groundwater or diverted as surface water, has been used for domestic, municipal or industrial purposes and which is available for reuse for any purpose, whether or not the water has been treated to improve its quality.

7. "Exempt well" means a well having a pump with a maximum capacity of not more than thirty-five gallons per minute which is used to withdraw groundwater for domestic purposes, including the non-commercial irrigation of not more than one acre of land.

8. "Expanded animal industry use" means increased water use by an animal industrial enterprise on the land in use by the enterprise on June 12, 1980 or on immediately adjoining land, excluding irrigation uses.

9. "Farm" means an area of irrigated land under the same ownership which is served by a water distribution system common to the irrigated land and to which can be applied common conservation, water measurement and water accounting procedures.

10. "Farm unit" means one or more farms irrigated with groundwater which are contiguous or in proximity to each other with similar soil conditions, crops and cropping patterns.

11. "Grandfathered right" means a right to withdraw and use groundwater pursuant to article 5 of this chapter based on the fact of lawful withdrawals and use of groundwater prior to the date of the designation of an active management area.

12. "Groundwater basin" means an area which, as nearly as known facts permit as determined by the director pursuant to this chapter, may be designated so as to enclose a relatively hydrologically distinct body or related bodies of groundwater, which shall be described horizontally by surface description.

13. "Initial active management area" means the Tucson, Phoenix, Prescott or Pinal active management area established by § 45-411.

14. "Irrigate" means to apply water to two or more acres of land to produce plants or parts of plants for sale or human consumption, or for use as feed for livestock, range livestock or poultry, as such terms are defined in § 24-101.

15. "Irrigation acre" means an acre of land, as determined in § 45-465, subsection B, to which an irrigation grandfathered right is appurtenant.

16. "Irrigation district" means a political subdivision, however designated, established pursuant to chapter 4 or 6 of this title.

17. "Irrigation grandfathered right" means a grandfathered right determined pursuant to § 45-465.

18. "Irrigation non-expansion area" means a geographical area which has been designated pursuant to article 3 of this chapter as having insufficient groundwater to provide a reasonably safe supply for the irrigation of the cultivated lands at the current rate of withdrawal.

19. "Irrigation use" means the use of groundwater on two or more acres of land to produce plants or parts of plants for sale or human consumption, or for use as feed for livestock, range livestock or poultry, as such terms are defined in § 24-101.

20. "Irrigation water duty" or "water duty" means the amount of water in acre-feet per acre that is reasonable to apply to irrigated land in a farm unit during the accounting period, as determined by the director pursuant to §§ 45-564

through 45-568.

21. "Non-irrigation grandfathered right" means a grandfathered right determined pursuant to § 45-463, 45-464, 45-469 or 45-472.

22. "Non-irrigation use" means a use of groundwater other than an irrigation use.

23. "Person" means an individual, public or private corporation, company, partnership, firm, association, society, estate, trust, any other private organization or enterprise, the United States, any state, territory or country or a governmental entity, political subdivison or municipal corporation organized under or subject to the constitution and laws of this state.

24. "Private water company" means any entity which distributes or sells groundwater, except a political subdivision or an entity established pursuant to this title which is not regulated as a public service corporation by the Arizona corporation commission under a certificate of public convenience and necessity. A city or town is not a private water company.

25. "Service area" means:

(a) With respect to a city or town, the area of land actually being served water by the city or town plus:

(i) Additions to such area which contain an operating distribution system owned by the city or town primarily for the delivery of non-irrigation water.

(ii) The service area of a city, town or private water company that obtains its water from the city pursuant to a contract entered into prior to the date of the designation of the active management area.

(b) With respect to a private water company, the area of land of the private water company actually being served water by the private water company plus additions to such area which contain an operating distribution system owned by the private water company primarily for the delivery of

non-irrigation water.

26. "Service area of an irrigation district" means:

(a) With respect to an irrigation district which was engaged in the withdrawal, delivery and distribution of groundwater as of the date of the designation of the active management area, the area of land within the boundaries of the irrigation district actually being served water by the irrigation district at any time during the five years preceeding the date of the designation of the active management area plus any areas as of the date of the designation of the active management area within the boundaries of the irrigation district which contain an operating system of canals, flumes, ditches and other works owned or operated by the irrigation district. The service area may be modified pursuant to § 45-494.01.

(b) With respect to an irrigation district which was not engaged in the withdrawal, delivery and distribution of groundwater as of the date of the designation of the active management area:

(i) The acres of member lands within the boundaries of the irrigation district which were legally irrigated at any time from January 1, 1975 through January 1, 1980 for initial active management area or during the five years preceding the date of the designation of the active management area for subsequent active management areas.

(ii) Any areas as of the date of the designation of the active management area within the boundaries of the irrigation district which contain an operating system of canals, flumes, ditches and other works for the withdrawal, delivery and distribution of water.

27. "Sub-basin" means an area which, as nearly as known facts permit as determined by the director pursuant to this chapter, may be designated so as to enclose a relatively hydrologically distinct body of groundwater within a groundwater basin, which shall be described horizontally by surface description.

28. "Subsequent active management area" means an active management area established after June 12, 1980 pursuant to article 2 of this chapter.

29. "Subsidence" means the settling or lowering of the surface of land which results from the withdrawal of groundwater.

30. "Transportation" means the movement of groundwater from the point of withdrawal to the point of use.

31. "Type 1 non-irrigation grandfathered right" means a non-irrigation grandfathered right associated with retired irrigated land and determined pursuant to § 45-463, 45-469 or 45-472.

33. "Type 2 non-irrigation grandfathered right" means a non-irrigation grandfathered right not associated with retired irrigated land and determined pursuant to § 45-464.

33. "Well" means a man-made opening in the earth through which water may be withdrawn or obtained from beneath the surface of the earth.

§ 45-403. Designation of groundwater basins and sub-basins; hearing

A. Within eighteen months of the effective date of this section[1], the director shall propose boundaries for all groundwater basins and sub-basins of groundwater basins in this state not included within initial active management areas established pursuant to § 45-411.

B. Within twenty-four months of the effective date of this section[1], the director shall hold public hearings to consider the final boundaries of groundwater basins and sub-basins in this state not included within initial active management areas established pursuant to § 45-411. The director shall give reasonable notice of the hearing appropriate to the circumstances which shall include the publication once each week for two consecutive weeks in a newspaper of general circulation in each county in which the proposed ground-

[1] June 12, 1980.

water basin is located. Any notice shall contain the time and place of the hearing, the legal description and a map clearly identifying and describing all lands to be included in the proposed groundwater basin and any sub-basin and any other information the director deems necessary.

C. The hearings shall be held at the county seat of the county in which the major portion of the land in the proposed groundwater basin is located as soon as practicable but no less than thirty days and no more than sixty days after the first publication of the notice of the hearing. At the hearing, the director shall present the factual data in his possession in support of the proposed action. Any person may appear at the hearing, either in person or by representative, and submit oral or documentary evidence for or against the proposed action. In making his determination, the director shall give full consideration to public comment and to recommendations made by local political subdivisions.

§ 45-404. Findings upon hearing; maps; order for boundaries of groundwater basin; review and modification of boundaries

A. Within sixty days after the hearing, the director shall make and file in his office written findings with respect to matters considered during the hearing. For each groundwater basin, the director shall prepare and file in his office:

1. A map clearly identifying all lands included within the groundwater basin and its sub-basins.

2. Factual data justifying the boundaries of the groundwater basin and sub-basins.

3. An order designating the boundaries of each groundwater basin and its sub-basins.

B. The findings and order shall be published in the manner and for the length of time prescribed for the publication of notice of the public hearing and the order is effective when published for the final time. The materials required by subsection A of this section and a transcript of

of the hearing are public records of the department and shall be available for examination by the public during regular business hours.

C. The director shall file a true copy of the map in the office of the county recorder of the county or counties in which the groundwater basin is located.

D. The director may, as conditions require and factual data justify, review and modify the boundaries of any groundwater basin or any sub-basin of a groundwater basin except for groundwater basins and sub-basins of a groundwater basin that are included within an initial active management area. The review and modification of boundaries of a groundwater basin or sub-basin included within a subsequent active management area or irrigation non-expansion area shall follow procedures set forth in §§ 45-417 and 45-438. Any modification of boundaries designated pursuant to this article shall follow as closely as practicable the procedural requirements § 45-403 and this section.

§ 45-405. Rehearing; appeals from decisions of the director; assignment of appeals

A. The director shall, by regulation, provide an opportunity for rehearing or review of any decision of the director.

B. Except as otherwise provided in this chapter, appeals from a decision of the director shall be conducted pursuant to title 12, chapter 7, article 6[1] and shall extend to all questions of law and fact presented by the record.

C. A hearing held by the director or hearing officer shall be stenographically reported. If the person appeals a decision of the director or hearing officer, a transcript shall be made.

D. If no hearing was held, the court shall remand to the director for purposes of conducting a hearing, unless the

[1] Section 12-901 et seq.

party appealing waives such remand and consents that the matter be decided by the court on the record before it.

E. No new or additional evidence in support of or in opposition to a finding, order, determination or decision of the director shall be heard by the court except if, in the discretion of the court, justice demands the admission of such evidence.

F. Each appeal under this section shall be assigned to a judge whom the chief justice of the supreme court has specifically designated, pursuant to § 45-406, to hear appeals under this section.

§ 45-406. Designation of judges; publication of designated judges

A. The chief justice of the supreme court, within sixty days after the effective date of this section,[1] shall designate at least one judge, but not more than five judges, of the superior court to hear appeals perfected under § 45-405. The chief justice of the supreme court shall also specify the particular county or counties for which each designated judge will be available for assignment.

B. The supreme court shall publish in the rules of the supreme court the name of each designated judge and the county or counties in which each designated judge will be available for assignment.

C. The presiding judge for the county in which an appeal has been perfected under § 45-405 shall assign the appeal to the appropriate judge designated by the chief justice of the supreme court and shall advise in writing the presiding judge and clerk of the superior court in the county in which the designated judge ordinarily sits about the assignment.

---

[1] June 12, 1980.

§ 45-407. Stay of director's decision; precedence of appeals; review by the court of appeals

A. The decision of the director shall not be stayed pending appeal, except that the judge to whom the appeal has been assigned may stay the decision of the director with or without bond upon a showing of good cause. In determining whether good cause exists under the circumstances, the court may consider:

1. The public interest will not be adversely affected by a stay.

2. The stay will not harm others.

3. There is a high probability that the appellant will succeed on the merits.

4. The appellant will suffer irreparable harm before a decision on the merits can be rendered.

B. For the benefit of the people of this state, appeals perfected under § 45-405 have precedence, in every court, over all other civil proceedings.

C. The final decision of the superior court is appealable in the same manner as in civil actions generally and shall be governed by the rules of appellate procedure.

ARTICLE 2. ACTIVE MANAGEMENT AREAS

§ 45-411. Initial active management areas; maps

A. Four initial active management areas are established on the effective date of this section.[1] The four initial active management areas are:

1. The Tucson active management area which includes the upper Santa Cruz and Avra valley sub-basins.

2. The Phoenix active management area which includes the east Salt river valley, west Salt river valley, Fountain hills, Carefree, lake Pleasant, Rainbow valley and Hassayampa sub-basins.

3. The Prescott active management area which includes the little Chino and upper Agua Fria sub-basins.

4. The Pinal active management area which includes the Maricopa-Stanfield, Eloy, Aguirre valley, Santa Rosa valley and Vekol valley sub-basins.

B. The boundaries of the initial active management areas are shown on the maps filed in the office of the secretary of state on the effective date of this chapter.[1]

C. A true copy of the maps identifying the initial active management areas shall be on file in the department and shall be available for examination by the public during regular business hours. A true copy of the map of each initial active management area shall also be filed in the office of the county recorder of the county or counties in which the active management area is located.

[1] June 12, 1980.

§ 45-412. Subsequent active management areas; criteria; review of groundwater basins not subject to active management

A. The director may designate an area which is not included within an initial active management area, pursuant to § 45-411, as a subsequent active management area if the director determines that any of the following exists:

1. Active management practices are necessary to preserve the existing supply of groundwater for future needs.

2. Land subsidence or fissuring is endangering property or potential groundwater storage capacity.

3. Use of groundwater is resulting in actual or threatened water quality degradation.

B. An active management area designated pursuant to this section may include more than one groundwater basin but shall not be smaller than a groundwater basin or include

only a portion of a groundwater basin, except for the regional aquifer systems of northern Arizona.

C. The director shall periodically review all areas which are not included within an active management area to determine whether such areas meet any of the criteria for active management areas as prescribed in this section.

§ 45-413. Hearing on designation of subsequent active management areas and boundaries; notice; procedures

A. If the director proposes to designate a subsequent active management area pursuant to § 45-412, subsection A, the director shall hold a public hearing to consider:

1. Whether to issue an order declaring the area an active management area.

2. The boundaries and any sub-basins of the proposed active management area.

B. The director shall give reasonable notice of the hearing under the circumstances which shall include publication once each week for two consecutive weeks in a newspaper of general circulation in each county in which the proposed active management area is located. Any notice shall contain the time and place of the hearing, the legal description and a map clearly identifying and describing all lands to be included in the proposed active management area and any sub-basins and any other information the director deems necessary.

C. The hearing shall be held at a location within the proposed active management area as soon as practicable but no less than thirty days and no more than sixty days after the first publication of the notice of hearing. At the hearing, the director shall present the factual data in his possession in support of the proposed action. Any person may appear at the hearing, either in person or by representative, and submit oral or documentary evidence for or against the proposed action. In making his determination, the director shall give full consideration to public comment and to

recommendations made by local political subdivisions.

§ 45-414. Findings upon hearing; order for active management area; publication

A. Within thirty days after the hearing, the director shall make and file in his office written findings with respect to matters considered during the hearing. If the director decides to declare an area an active management area, the director shall make and file an order designating the active management area.

B. The findings and order shall be published in the manner and for the length of time prescribed for the publication of notice of the public hearing, and the order is effective when published for the final time. All factual data compiled by the director, a transcript of the hearing, a copy of the findings and a map identifying the lands included in the active management area are public records of the department and shall be available for examination by the public during regular business hours.

C. The director shall file a true copy of the map in the office of the county recorder of the county or counties in which the active management area is located.

§ 45-415. Local initiation for active management area; procedures

A. A groundwater basin which is not included within an initial active management area may be designated an active management area upon petition by ten percent of the registered voters residing within the boundaries of the proposed active management area, as of the most recent report compiled by the county recorder in compliance with § 16-168, subsection G, and a subsequent election held pursuant to the general election laws of this state. The form of the petition shall be the same as for initiative petitions, and the applicant for such petition shall comply with the provisions of § 19-111.

B. Upon application for a petition number with the clerk of the board of supervisors or county election officer, the director shall transmit a map of the groundwater basin to the county recorder of each county in which the proposed active management area is located. The map shall be on a scale adequate to show with substantial accuracy where the boundaries of the groundwater basin cross the boundaries of county voting precincts. The director shall also transmit to the county recorder all other factual data concerning the boundaries of the groundwater basin that may aid the county recorder in the determination of which registered voters of the county are residents of the groundwater basin.

C. Any registered voter of a county whose residency in the groundwater basin is in question shall be allowed to vote. The ballot shall be placed in a separate envelope, the outside of which shall contain the precinct name and number, the signature of the voter, the residence address of the voter, and the voter registration number of the voter, if available. The voter receipt card shall be attached to the envelope. The county recorder shall verify the ballot for proper residency of the voter before counting. Such verification shall be made within two days following the election, and the voter receipt card shall be returned to the voter. Verified ballots shall be counted using the procedure outlined for counting absentee ballots. If residency in the groundwater basin is not verified, the ballot shall remain unopened and shall be destroyed.

D. Except as provided in subsection E of this section, all election expenses incurred pursuant to this section are the responsibility of the county involved.

E. If a groundwater basin is located in two or more counties, the following procedures apply:

1. The petition shall be filed with the clerk of the board of supervisors or county election officer of the county in which the plurality of the registered voters in the groundwater basin resides.

2. The number of registered voters required to sign the petition shall be ten per cent of the registered voters residing within the boundaries of the proposed active management area, as of the most recent report compiled by the county recorder in compliance with § 16-168, subsection G, within the county in which the plurality of the registered voters in the groundwater basin resides.

3. The election shall be called by the board of supervisors of the county in which the petition is filed, and the board shall immediately notify the board of supervisors of any other county included in the groundwater basin of the date of the election. The election shall be held not less than sixty days or more than ninety days from the date of call. The board of supervisors so notified shall then call the election in their county for the same date and follow the procedures for conducting the general elections in this state.

4. All election expenses incured pursuant to this subsection are the responsibilities of the counties involved on a proportional basis considering the number of registered voters of each county that are residents of the groundwater basin.

F. The ballot shall be worded, "should the (insert name of basin) groundwater basin be designated an active management area?" Followed by the words "yes" and "no". Opposite each such word there shall be a square in which the voter may make a cross indicating his preference.

§ 45-416. Limitation on number of irrigated acres

A. If the director initiates the procedure for designating a subsequent active management area or the board of supervisors calls an election to establish an active management area, an irrigation user may not increase the number of his irrigated acres within the proposed active management area in excess of the highest number of acres he has irrigated within the proposed active management area at one time in one year in the five years preceding the initiation of desig-

nation procedures by the director or the call for the election by the board of supervisors.

B. The limitation on the number of irrigated acres shall continue in effect until the director makes a final determination pursuant to § 45-414 or the final results of an election to establish an active management area pursuant to § 45-415 are certified by the board of supervisors of the county or counties in which the proposed subsequent active management area is located.

§ 45-417. Review and modification boundaries of subsequent active management area

A. The director may review and modify the boundaries of a subsequent active management area or any of its subbasins as conditions require and factual data justify.

B. The director shall review the boundries of a subsequent active management area or any of its sub-basins upon receipt of a petition signed by persons who together withdraw not less than one-fourth of the groundwater withdrawn in the active management area or by request of the groundwater users advisory council in the active management area.

C. Before modifying the boundaries of a subsequent active management area or any of its sub-basins the director shall give notice of and hold a hearing on the proposed modifications pursuant to the procedures prescribed by § 45-413. After the hearing, the director shall prepare written findings pursuant to § 45-414.

§ 45-418. Area director; appointment; term; qualifications; compensation

A. The director shall appoint an area director for each active management area. For reasons of economy and efficiency in administration, one person may be the area director for more than one active management area. The area director shall serve at the pleasure of the director.

B. The area director is exempt from the state personnel system and is entitled to received compensation as determined pursuant to § 38-611.

§ 45-419. Duties of area director

The area director shall:

1. Assist the director in the development of the management plan for the active management area and implement the plan under the director's supervision.

2. Have such other duties as the director may assign and shall be responsible to the director for the performance of such duties.

3. Furnish technical and clerical services and such other assistance to the groundwater users advisory council as is required, to the extent funds are made available for such assistance.

§ 45-420. Groundwater users advisory councils; appointment; representation of water users; term; compensation

A. There shall be a groundwater users advisory council in each active management area consisting of five members. Members of the council shall be appointed by the governor to represent the users of groundwater in the active management area and on the basis of their knowledge of, interest in and experience with problems relating to the development, use and conservation of water.

B. Members of the council shall serve without compensation, except that each member shall be reimbursed for travel and subsistence while engaged in business of the council in the same manner as is provided by law for state officers.

§ 45-421. Administrative duties of the groundwater users advisory councils.

The groundwater users advisory ccouncil shall:

1. Advise the area director for the active management

area, make recommendations on groundwater management programs and policies for the active management area and comment on proposed management plans for the active management area before they are adopted by the director.

2. Keep the minutes of its meetings and all records, reports and other information relative to its work and programs in permanent form indexed and systematically filed.

3. Elect from its members a chairman and vice-chairman for terms of two years expiring on the third Monday of January of each even numbered year.

4. Designate the person or persons who shall execute all documents and instruments on behalf of the council.

5. Manifest and record its actions by motion, resolution or other appropriate means.

6. Make a complete record of its proceedings which shall be open to public inspection during regular business hours in the branch office of the department in the active management area.

ARTICLE 3. IRRIGATION NON-EXPANSION AREAS

§ 45-431. Initial irrigation non-expansion areas

The Douglas critical groundwater area and the Joseph city critical groundwater area, delineated in the orders of the state land commissioner dated May 5, 1965 and December 16, 1974, respectively, are designated as initial irrigation non-expansion areas on the effective date of this chapter and are governed by the provisions of this article.

§ 45-432. Subsequent irrigation non-expansion areas; designation; review

A. The director may designate an area which is not included within an active management area as a subsequent irrigation non-expansion area if the director determines that both of the following apply:

1. There is insufficient groundwater to provide a reasonably safe supply for irrigation of the cultivated lands in the area at the current rates of withdrawal.

2. The establishment of an active management area pursuant to § 45-412 is not necessary.

B. An irrigation non-expansion area established pursuant to this section may include more than one groundwater sub-basin but shall not be smaller than a groundwater sub-basin or include only a portion of a groundwater sub-basin.

§ 45-433. Local initiation for designation; procedures

A. The designation of a subsequent irrigation non-expansion area may be initiated by the director or by petition to the director signed by either:

1. Not less than twenty-five irrigation users of groundwater, or one-fourth of the irrigation users of groundwater within the boundaries of the groundwater basin or sub-basin specified in the petition.

2. Ten per cent of the registered voters residing within the boundaries of the groundwater basin or sub-basin specified in the petition as of the most recent report compiled by the county recorder in compliance with § 16-168, subsection G. The form of the petition shall be the same as for an initiative petition and the applicant for such petition shall comply with the provisions of § 19-111. If a groundwater basin or sub-basin is located in two or more counties, the number of registered voters residing within the boundaries of the groundwater basin or sub-basin, as of the most recent report compiled by the county recorder in compliance with § 16-168, subsection G, within the county in which the plurality of the registered voters in the groundwater basin or sub-basin resides.

B. Upon receipt of a petition pursuant to subsection A, paragraph 2 of this section, the director shall transmit the petition to the county recorder of each county in which the

groundwater basin or sub-basin is located for verification of signatures. In addition, the director shall transmit a map of the groundwater basin or sub-basin to the county recorder of each such county included. The map shall be on a scale adequate to show with substantial accuracy where the boundaries of the groundwater basin or sub-basin cross the boundaries of county voting precincts. The director shall also transmit to the county recorder all other factual data concerning the boundaries of the groundwater basin or sub-basin that may aid the county recorder in the determination of which registered voters of the county are residents of the groundwater basin or sub-basin.

§ 45-434. Limitation on number of irrigated acres

A. If procedures are initiated, whether by the director or by petition, for designating an irrigation non-expansion area, an irrigation user may not increase the number of his irrigated acres within the proposed irrigation non-expansion area in excess of the highest number of acres he has irrigated within the proposed irrigation non-expansion area at one time in one year in the five years preceding the notice of the initiation of designation procedures by the director or the filing of the petition by the registered voters.

B. The limitation on the number of irrigated acres shall continue in effect until the director makes a final determination pursuant to § 45-436.

§ 45-435. Hearing on designation of subsequent irrigation non-expansion areas and boundaries; notice; procedures

A. If the director finds that an area which is not included within an active management area meets the criteria specified in § 45-432, or a petition is filed pursuant to § 45-433, the director shall hold a public hearing to consider:

1. Whether to issue an order declaring the area an irrigation non-expansion area.

2. The boundaries of the proposed irrigation non-expansion area.

B. The director shall give reasonable notice of the hearing under the circumstances which shall include the publication once each week for two consecutive weeks in a newspaper of general circulation in each county in which the proposed irrigation non-expansion area is located. Any notice shall contain the time and place of the hearing, the legal description and a map clearly identifying and describing all lands to be included in the proposed irrigation non-expansion area and any other information the director deems necessary.

C. The hearing shall be held at a location in the county in which the major portion of the proposed irrigation non-expansion area is located no less than thirty days, but no more than sixty days after the first publication of the notice of the hearing. At the hearing, the director shall present the factual data in his possession in support of or in opposition to the proposed action. Any person may appear at the hearing, either in person or by representative, and submit oral or documentary evidence for or against the proposed action. In making his determination, the director shall give full consideration to public comment and to recommendations made by local political subdivisions.

§ 45-436. Findings upon hearing; order for irrigation non-expansion area; publication

A. Within thirty days after the hearing, the director shall make and file in his office written findings with respect to matters considered during the hearing. If the director decides to declare an area an irrigation non-expansion area, the director shall make and file an order designating the irrigation non-expansion area.

B. The findings and order shall be published in the manner and for the length of time prescribed for the publication of notice of the public hearing, and the order effective when published for the final time. All factual data compiled by the director, a transcript of the hearing, a copy of

the findings and a map identifying the lands included in the irrigation non-expansion area are public records of the department and shall be available for examination by the public during regular business hours.

C. The director shall file a true copy of the map in the office of the county recorder of the county or counties in which the irrigation non-expansion area is located.

§ 45-437. Irrigated acreage; water measuring device; transportation

A. In an initial irrigation non-expansion area established pursuant to § 45-431, only acres of land which were legally irrigated at any time between January 1, 1975 and January 1, 1980 may be irrigated, and an irrigation user or his successor may irrigate in any one year only the highest number of acres the user irrigated in any one year in the five years between January 1, 1975 and January 1, 1980.

B. In a subsequent irrigation non-expansion area established pursuant to § 45-432, only acres of land which were irrigated at any time during the five years preceding the notice of the initiation of the procedures to designate the irrigation non-expansion area may be irrigated, and an irrigation user or his successor may irrigate in any one year only the highest number of acres the user has irrigated in any one year in the five years preceding the notice of the initiation of the procedures to designate the irrigation non-expansion area.

C. In an irrigation non-expansion area:

1. Each person withdrawing groundwater from a non-exempt well shall use a water measuring device approved by the director and shall file a report on a calendar year basis with the director on a form provided by the director no later than March 31 of the following year.

2. Transportations of groundwater are subject to the provisions of article 8 of this chapter.[1]

[1] Section 45-541 et seq.

§ 45-438. Review and modification of boundaries of irrigation non-expansion areas

A. The director may review and modify the boundaries of an irrigation non-expansion area as conditions require and factual data justify.

B. The director shall review the boundaries of an irrigation non-expansion area upon receipt of a petition signed by persons who together withdraw not less than one-fourth of the groundwater withdrawn in the irrigation non-expansion area.

C. Before modifying the boundaries of an irrigation non-expansion area, the director shall give notice of and hold a hearing on the proposed modifications pursuant to the procedures prescribed by § 45-435. After the hearing, the director shall prepare written findings pursuant to § 45-436.

§ 45-439. Conversion from irrigation non-expansion area to active managment area; director; local initiation; procedures

A. The director may designate an irrigation non-expansion area as an active management area if the director determines that the irrigation non-expansion area meets any of the criteria for designating an active management area specified in § 45-412, subsection A.

B. Any action taken under this section is subject to the procedures for notice and hearing prescribed by §§ 45-413 and 45-414.

C. An irrigation non-expansion area may be designated an active management area upon petition and election pursuant to § 45-415 by the registered voters residing in the groundwater basin which is or includes the irrigation non-expansion area.

ARTICLE 4.
GROUNDWATER RIGHTS AND USES IN GENERAL

§ 45-451. Groundwater rights and uses in active management areas

A. In an active management area, a person may withdraw and use groundwater only in accordance with the provisions of article 5 through 12 of this chapter.[1]

B. This chapter shall not be construed to affect decreed and appropriative water rights.

---

[1] Sections 45-461 et seq., 45-491 et seq., 45-511 et seq., 45-541 et seq., 45-561 et seq., 45-591 et seq., 45-611 et seq., 45-631 et seq.

§ 45-452. No new irrigated acreage in active management areas; central Arizona project water; agricultural experimentation; definition

A. In an initial active management area, except as provided in subsections B and H of this section, only acres of land which were legally irrigated at any time from January 1, 1975 through January 1, 1980, which are capable of being irrigated, which have not been retired from irrigation for a non-irrigation use pursuant to § 45-463 or 45-469 and for which the irrigation grandfathered right has not been conveyed for a non-irrigation use, may be irrigated with any water. In an initial active management area, land which was not irrigated at any time from January 1, 1975 through January 1, 1980 is deemed to have been in irrigation if the director finds that either of the following apply:

1. In areas of an initial active management area not designated as critical groundwater areas under prior statutory law prior to the date of the designation of the active management area, land is deemed to have been in irrigation if substantial capital investment has been made for the subjugation of such land for an irrigation use including onsite irrigation distribution facilities and a well or wells the

drilling and construction of which were substantially commenced prior to the date of the designation of the active management area.

2. In areas of an initial active management area which were designated as critical groundwater areas under prior statutory law, land is deemed to have been in irrigation if substantial capital investment has been made in the twelve months before June 12, 1980 for the improvement of the land and on-site irrigation distribution facilities, including the drilling of wells, for an irrigation use. This paragraph does not allow irrigation of land which could not have been legally irrigated under prior statutory law.

B. In an initial active management area, a person who owns acres of land which may be irrigated pursuant to subsection A of this section may apply to the director during the central Arizona project contracting period, but no later than January 1, 1985, to permanently retire all or a portion of such acres from irrigation and to irrigate conjunctively with central Arizona project water the same number of substitute acres. The director may approve the substitution of acres if the director determines that all of the following exist:

1. The substitute acres were legally irrigated during the period of September 30, 1958 to September 30, 1968, or such other period as the United States secretary of the interior may designate.

2. The acres to be retired from irrigation and the substitute acres are located outside of the exterior boundaries of the service area of a city, town or private water company and such acres are located within the same irrigation district and the same sub-basin.

3. The substitution of acres is necessary to enable the irrigation district within which the acres are located to contract for and deliver central Arizona project water.

4. Central Arizona project water available to the irrigation district within which the acres are located will be ade-

quate to supply the substitute acres.

5. The substitution of acres will benefit the management of the active management area in which the acres are located.

C. The director shall give notice of an application to substitute acres pursuant to subsection B of this section once each week for two consecutive weeks in a newspaper of general circulation in the county or counties in the active management area in which the irrigation district is located. The notice shall state that written objections to the substitution of acres may be filed by persons residing in the active management area in writing with the director within thirty days after the last publication of notice and that objections are limited to whether the application meets the criteria for substitution of acres as set forth in subsection B of this section. An objection shall state the name and mailing address of the objector, be signed by the objector, his agent or attorney and clearly set forth reasons why the substitution should not be allowed. In appropriate cases, including cases where a proper written objection has been filed, the director may hold a hearing. The director shall, thirty days prior to the date of the hearing, give notice in the manner described in this section. A hearing shall be conducted as provided in § 45-480, subsection B.

D. Any acres permanently retired from irrigation pursuant to subsection B of this section relinquish their irrigation grandfathered rights, and such rights are deemed to be appurtenant to the substitute acres. Groundwater withdrawn or received for the irrigation of the substitute acres pursuant to an irrigation grandfathered right shall be reduced by the amount of central Arizona project water received for such acres.

E. The service area of the irrigation district in which the acres are located shall be modified to permanently delete the acres permanently retired from irrigation and include the substitute acres.

F. If a person retires land from irrigation pursuant to subsection B of this section, groundwater shall not be withdrawn from such retired land for any purpose unless pursuant to a groundwater withdrawal permit or unless withdrawn by a city, town or private water company within the service area of such city, town or private water company.

G. In a subsequent active management area, except as provided in subsection H of this section, only acres of land which were legally irrigated at any time during the five years preceding the date of the designation of the active management area, which are capable of being irrigated, which have not been retired from irrigation for a non-irrigation use pursuant to § 45-463 or 45-469 and for which the irrigation grandfathered right has not been conveyed for a non-irrigation use, may be irrigated with any water.

H. In an active management area, a state university engaged in the teaching, study of and experimentation in the science of agriculture may irrigate not more than three hundred twenty acres of land for such purposes with not more than five acre-feet of groundwater per acre per year. Water produced from any well pursuant to this subsection shall not be leased, sold or transported off the irrigated land operated by the state university. The right to withdraw and use groundwater pursuant to this subsection does not require a withdrawal permit, is not a grandfathered right, shall not give rise to a grandfathered right and may not be conveyed to any other user.

§ 45-453. Groundwater rights and uses in areas outside active management areas; amounts; transportation; irrigation non-expansion areas

In areas outside of active management areas, a person may:

1. Withdraw and use groundwater for reasonable and beneficial use.

2. Transport groundwater pursuant to article 8 of this chapter.[1]

3. Use groundwater for irrigation purposes within the exterior boundaries of an irrigation non-expansion area only pursuant to article 3 of this chapter.[2]

---

[1] Section 45-541 et seq.

[2] Section 45-531 et seq.

§ 45-454. Exemption of small domestic wells

Withdrawals of groundwater for domestic purposes including the non-commercial irrigation of not more than one acre of land from wells having a pump with a maximum capacity of not more than thirty-five gallons per minute are exempt from the provisions of this chapter except that:

1. A person withdrawing groundwater from an exempt well shall register the well with the director pursuant to § 45-593.

2. A person shall file notice of intention to drill with the director pursuant to § 45-596 before drilling an exempt well or causing an exempt well to be drilled and an exempt well shall comply with the well construction standards prescribed pursuant to § 45-594.

§ 45-455. Application to state lands

This chapter applies to all lands owned by the state of Arizona and any of its political subdivisions.

ARTICLE 5. GRANDFATHERED GROUNDWATER RIGHTS IN ACTIVE MANAGEMENT AREAS

§ 45-461. Definitions

In this article, unless the context otherwise requires:

1. "Certificate of exemption" means a certificate which was issued by the state land department or Arizona water commission under prior statutory law for the purpose of describing specific uses and amounts of water which could

not be enjoined if found to constitue the transfer or transportation of groundwater.

2. "Development plan" means a plan for the non-irrigation use of land in connection with which land has been or will be retired from irrigation for the bona fide purpose of conserving or using water for such non-irrigation use which would otherwise be used to irrigate the retired land.

3. "Owner" means:

(a) With respect to an irrigation grandfathered or a type 1 non-irrigation grandfathered right, the owner of the land to which the right is appurtenant.

(b) With respect to a type 2 non-irrigation grandfathered right, the owner of the land from which groundwater is withdrawn pursuant to the right.

4. "Same ownership" means ownership by the same person or entity or by successor persons or entities as a result of succcession to heirs and personal representatives, corporate and partnership reorganizations, mergers, dissolutions, divestitures, partneships, partitions, joint ventures, foreclosures, receivership or bankruptcy, purchase of capital stock, sale pursuant to United States Code, title 11 or similar succession, but not by outright sale to a bona fide purchaser for value where no portion of or beneficial interest in the successor in interest is retained by the original owner, its shareholders, partners, limited partners or beneficiaries.

5. "Water duty acres" means the acres of land in a farm, as determined pursuant to § 45-465, subsection B, which are used in calculating the maximum amount of groudnwater which may be used pursuant to an irrigation grandfathered right.

§ 45-462. Grandfathered groundwater rights; persons included; certificate of exemption amount is legal use

A. In an active management area, a person who was legally withdrawing and using groundwater as of the date of the designation of the active management area or who owns land legally entitled to be irrigated with groundwater as determined pursuant to this article has the right to withdraw or receive and use groundwater as determined by the director pursuant to this article.

B. For purposes of determining grandfathered rights pursuant to this article, a groundwater use shall not be determined to be illegal merely because the groundwater legally withdrawn is or has been transported.

C. The amount of groundwater use described by an application for a certificate of exemption is recognized as a legal use for purposes of determining grandfathered rights pursuant to § 45-464, subject to any modification as a result of a finding on appeal of a factual mistake by the state land department or Arizona water commission in computing the amount of the authorized withdrawal.

D. The right to withdraw or receive and use groundwater pursuant to this article is a grandfathered right. There are three categories of grandfathered rights as follows:

1. Non-irrigation grandfathered rights associated with retired irrigated land as determined pursuant to §§ 45-463, 45-469 and 45-472.

2. Non-irrigation grandfathered rights not associated with retired irrigated land as determined pursuant to § 45-464.

3. Irrigation grandfathered rights as determined pursuant to § 45-465.

§ 45-463. Type 1 non-irrigation grandfathered right associated with retired irrigated land; appurtenancy; ownership

A. In an initial active management area, a person who owns land which was legally entitled to be irrigated with groundwater and who retired such land from irrigation

after January 1, 1965 but prior to the date of the designation of the active management area in anticipation of a non-irrigation use has the right to withdraw from or receive for such land three acre-feet of groundwater per acre per year upon showing that:

1. The land has been held under the same ownership since it was retired.

2. A development plan for the proposed non-irrigation use existed at the time the land was retired.

B. In a subsequent active management area, a person who owns land which was legally entitled to be irrigated with groundwater and retires such land from irrigation prior to the date of the designation of the active management area in anticipation of a non-irrigation use has the right to withdraw from or receive for such land the lesser of three acre-feet of groundwater per acre per year or the average annual amount of groundwater which was used per acre during the five years preceding the time the land was retired upon showing that:

1. The land has been held under the same ownership since it was retired.

2. A development plan for the proposed non-irrigation use existed at the time the land was retired and is filed with the director within ninety days after the active management area is designated.

C. The development plan requirements of this section are deemed fulfilled if the land retired from irrigation has been described in an application for a certificate of exemption or if the land retired from irrigation is owned in conjunction with non-irrigation uses existing or for which substantial capital commitments have been incurred for the non-irrigation development of such land as of the date of the designation of the active management area.

D. The right to withdraw or receive groundwater pursu-

ant to this section is a non-irrigation grandfathered right associated with retired irrigated land, or a type 1 non-irrigation grandfathered right.

E. A type 1 non-irrigation grandfathered right is appurtenant to the acre of retired irrigated land associated with the right, is owned by the owner of the land to which the right is appurtenant and may be leased with the land.

§ 45-464. Type 2 non-irrigation grandfathered right not associated with retired irrigated land; determination of amount; ownership

A. In an active management area, a person who owns land from which groundwater was being legally withdrawn and used for a non-irrigation purpose as of the date of the designation of the active management area has the right to withdraw annually:

1. If the person holds a certificate of exemption, the greater of:

(a) The amount of groundwater established in proceedings on the application for certificate of exemption, subject to any modification as a result of a finding on appeal of a factual mistake by the state land department or Arizona water commission in computing the amount of the authorized withdrawal, less the amount of any right obtained by the person pursuant to § 45-463.

(b) The maximum amount of groundwater legally withdrawn from such land and used by the person in any one of the five years preceding the date of the designation of the active management area, less the amount of any right obtained by the person pursuant to § 45-463.

2. If the person does not hold a certificate of exemption, the maximum amount of groundwater legally withdrawn from such land and used by the person withdrawing the groundwater in any one of the five years preceding the date of the designation of the active management area, less the amount of any right obtained pursuant to § 45-463 by the

person withdrawing groundwater from such land which has not been subtracted by the person withdrawing the groundwater in calculating the amount of another right pursuant to this section.

B. If the calculation in subsection A of this section results in an amount greater than zero, that amount is a grandfathered right in addition to any right obtained pursuant to § 45-463.

C. For the purposes of this section, "person" includes:

1. A city, town or private water company which owns land outside of the service area of such city, town or private water company from which groundwater was being legally withdrawn for a non-irrigation gse as of the date of the designation of the active management area.

2. A city, town or private water company withdrawing groundwater from within its service area pursuant to a certificate of exemption.

3. Any other non-irrigation user.

D. If a person has been using groundwater for less than one year during the twelve months immediately preceding the date of the designation of the active management area, the amount of the grandfathered right pursuant to this section is the annual amount determined by the director to be reasonable for a full year to meet the requirements for a facility owned by such person in existence as of the date of the designation of the active management area.

E. The right to withdraw groundwater pursuant to this section is a non-irrigation grandfathered right not associated with retired irrigated land, or a type 2 non-irrigation grandfathered right.

F. A type 2 non-irrigation grandfathered right is owned by the owner of the land from whicch the groundwater is withdrawn and may be leased with such land.

G. If the user of a type 2 non-irrigation grandfathered

right is different from the owner of the right, either the owner, or the user of the right on behalf of the owner, may apply for a certificate of grandfathered right pursuant to § 45-476.

§ 45-465. Irrigation grandfathered right; determination of acres entitled to and amount; appurtenancy

A. In an active management area, a person who owns land which was legally irrigated at any time during the five years preceding January 1, 1980 for initial active management areas or the date of the designation of the active management area for subsequent active management areas, which is capable of being irrigated and which has not been retired from irrigation for a non-irrigation use pursuant to § 45-463 or 45-469, has the right to use groundwater for the irrigation of such land as determined pursuant to subsection B of this section.

B. The director shall compute the maximum amount of groundwater which may be used pursuant to this section as follows:

1. Determine the farm units, as defined in § 45-402, within the active management area.

2. Determine the irrigation water duty, as defined in § 45-402, for each farm unit in an active management area, pursuant to §§ 45-564 through 45-568.

3. Determine the water duty acres for each farm within the farm unit. The water duty acres are the highest number of acres in the farm, taking land rotation into account, which were legally irrigated during any one year in the five years preceding January 1, 1980 for initial active management areas or the date of the designation of the active management area for subsequent active management areas.

4. Determine the irrigation acres for each farm within the farm unit. The irrigation acres are the acres in the farm which were legally irrigated at any time during the five years preceding January 1, 1980 for initial active manage-

ment areas or the date of the designation of the active management area for subsequent active management areas, which are capable of being irrigated and which have not been retired from irrigation for a non-irrigation use pursuant to § 45-463 or 45-469.

5. Multiply the water duty acres for each farm within the farm unit by the irrigation water duty for the farm unit and divide that amount by the number of irrigation acres in the farm. The result shall be the maximum amount of groundwater which may be used per year for the irrigation of each irrigation acre in the farm. If the farm is irrigated solely with groundwater, the amount of groundwater used by the farm for irrigation shall be accounted for pursuant to § 45-467, subsection C. If a farm is irrigated with a combination of surface water and groundwater, the amount of groundwater used by the farm for irrigation shall be accounted for pursuant to § 45-467, subsections D and E.

C. The right to use groundwater pursuant to this section for the irrigation of an irrigation acre is an irrigation grandfathered right and is appurtenant to that acre. An irrigation grandfathered right is owned by the owner of the land to which it is appurtenant and may be leased for an irrigation use with the land to which it is appurtenant.

D. A person who owns or leases irrigation acres may use the total amount of groundwater allowed by the irrigation grandfathered right for such acres for the irrigation of all or a portion of such acres.

E. If the irrigation water duty for the farm unit in which an irrigation acre is located is reduced by the director pursuant to article 9 of this chapter, the amount of groundwater which may be used for the irrigation of such acre pursuant to the irrigation grandfathered right under this section is reduced accordingly.

F. For purposes of this chapter, the amount of groundwater which may be used or is used is the amount of

groundwater withdrawn by the groundwater user, measured at the point of withdrawal, and the amount of groundwater received by the groundwater user from an irrigation district or other source.

§ 45-466. Limitations on use of irrigation water duty; deliveries of water in excess of irrigation water duty

The irrigation water duty shall be used to determine the maximum amount of groundwater which may be used pursuant to § 45-465 and debits and credits to the operating flexibility account as set forth in § 45-467. The irrigation water duty shall not be applied to diminish surface water delivered to lands pursuant to appropriative surface water rights or decreed surface water rights.

§ 45-467. Withdrawals in excess of irrigation grandfathered right; withdrawals less than irrigation grandfathered right; operating flexibility account; conveyances; variance

A. A person who is entitled to use groundwater pursuant to an irrigation grandfathered right may:

1. Use groundwater in excess of the amount allowed by the right in an amount determined pursuant to subsection F of this section.

2. Use less than the amount allowed by the right in one accounting period and use the remaining amount allowed by the right in a succeeding accounting period or periods.

B. The director shall establish rules and regulations for the maintenance of an operating flexibility account for each farm in an active management area.

C. If a farm is irrigated solely with groundwater, the director shall:

1. Register a debit to the account in any accounting period in which the amount of groundwater used for the irrigation of the irrigation acres in the farm is greater than the current irrigation water duty for the farm multiplied by the water duty acres in the farm.

2. Register a credit to the account in any accounting period in which the amount of groundwater used for the irrigation of the irrigation acres in the farm is less than current irrigation water duty for the farm multiplied by the water duty acres in the farm.

D. If a farm is irrigated with surface water and groundwater, and uses of water by the farm from all sources for irrigation purposes in the accounting period:

1. Exceed the amount of the current irrigation water duty for the farm multiplied by the water duty acres in the farm, the amount of groundwater used up to the amount of the excess shall be registered as a debit to the account.

2. Are less than the amount of the current irrigation water duty for the farm multiplied by the water duty acres in the farm, the amount of water not used which would have been groundwater shall be registered as a credit to the account.

E. A person who uses a combination of surface water and groundwater for irrigation purposes may credit against his use of groundwater in an accounting period surface water released from storage facilities into a surface water distribution system to avoid spilling, if such surface water is actually applied to the person's land and would cause a debit to be incurred. The credit allowed under this subsection shall be applied only against the person's operating flexibility account debits which otherwise would have been incurred that year and shall not be used to discharge debits from prior years or accumulate credits for future years.

F. The maximum excess amount of groundwater that may be used pursuant to this section is equal to fifty per cent of the current irrigation water duty for the fam multiplied by the water duty acres in the farm. The operating flexibility account may not be in arrears at any time in excess of this amount. Groundwater equal to the credit balance in the operating flexibility account may be used at any time.

G. If an irrigation grandfathered right is conveyed for an irrigation use purusant to § 45-472, each acre conveyed shall carry with it a proportional share of any debits or credits in the operating flexibility account for the farm. If an irrigation grandfathered right is conveyed for a non-irrigation use pursuant to § 45-472, each acre conveyed shall carry with it a proportional share of any debits in the operating flexibility account for the farm.

H. A person using groundwater pursuant to an irrigation grandfathered right who is operating under a variance to the irrigation water duty pursuant to § 45-574:

1. May accumulate a maximum debit in an amount equal to fifty per cent of the current irrigation water duty for the farm multiplied by the water duty acres in the farm.

2. Shall accumulate credits pursuant to subsection C, D or E of this section.

I. A person using groundwater pursuant to an irrigation grandfathered right shall file a report with the director each year which shall include the amount of groundwater used pursuant to the irrigation grandfathered right and such other information as the director shall require. The director may consolidate the reporting requirements of this section with the reporting requirements of § 45-632.

§ 45-468. Accounting of water by persons delivering a combination of surface water and groundwater for irrigation uses

A. A person delivering a combination of surface water and groundwater for irrigation uses shall prior to the beginning of each accounting period estimate the amount of groundwater that will be withdrawn and delivered during the next accounting period and shall make such estimate available to the director. The estimate may be modified from time to time as conditions warrant.

B. Within ninety days following the end of each accounting period a person who delivers a combination of surface

water and groundwater for uses by cities, towns, private water companis, industries, farms or other users shall provide the director with an accounting for water during the past accounting period which shows the following:

1. All surface water provided to each class of user and each farm.

2. All groundwater provided to each class of user and each farm.

C. If a person delivers a combination of surface water and groundwater to users, the amount of groundwater charged to each user pursuant to the accounting in subsection B is the amount delivered directly to each user and a pro rata amount of any additional amount of groundwater which is commingled with surface water and delivered to all classes of users.

§ 45-469. Right to retire irrigation grandfathered right for non-irrigation use; development plan approval; amendment of plan prior to retirement; amount which may be withdrawn; service area determined

A. A person who owns land legally entitled to be irrigated with groundwater pursuant to an irrigation grandfathered right which is located within an active management area and outside of the exterior boundaries of the service area of a city, town or private water company has the right to retire such land from irrigation in anticipation of a future non-irrigation use and shall not forfeit or abandon the right to withdraw from or receive for such land the amount of groundwater calculated pursuant to subsection F of this section for a non-irrigation use if:

1. The land is held in the same ownership.

2. A development plan for the proposed non-irrigation use exists and is approved by the director within a reasonable time before or after the land is retired.

B. The director shall approve the development plan

required by subsection A of this section if it appears that the land:

1. Has been or will be retired for the bona fide purpose of conserving or using water for a non-irrigation use which would otherwise continue to be used for irrigation of such land.

2. Has not been sold or taken out of production primarily because it would have been uneconomical to continue to withdraw water for irrigation.

C. The director shall not investigate the legality, other than pursuant to this chapter, feasibility or other factors involved in the proposed development plan and shall not disapprove a development plan on such grounds.

D. A development plan may be amended and the director shall approve amendments if the criteria of this section are met.

E. A person proposing to retire irrigated land which is located inside or outside of an active management area may apply to the director for approval of a proposed development plan prior to the retirement of such land.

F. The amount of groundwater which may be withdrawn or received annually per acre pursuant to this section is the lesser of:

1. The current maximum amount of groundwater which may be used pursuant to the irrigation grandfathered right for the acre at the time it is retired, as calculated pursuant to § 45-465, subsection B.

2. Three acre-feet multiplied by the water duty acres in the farm in which the acre to which the right is appurtenant is located divided by the number of irrigation acres in the farm.

G. The right to withdraw or receive groundwater pursuant to this section is a non-irrigation grandfathered right associated with retired irrigated land, or a type 1 non-irrigation grandfathered right as described in § 45-463.

H. Whether the land to which an irrigation grandfathered right is appurtenant is within the exterior boundaries of the service area of a city, town or private water company shall be determined as of the date the development plan is filed with the director acording to the most current map of the service area of the city, town or private water company available for public inspection on that date as required by § 45-498:

1. In the city clerk's office for a city.

2. In the town clerk's office for a town.

3. In the appropriate county recorder's office for a private water company.

§ 45-470. Use of type 1 non-irrigation grandfathered right by original owner

A. The original owner of a type 1 non-irrigation grandfathered right pursuant to § 45-463 or 45-469 may:

1. Use groundwater withdrawn pursuant to the right for any non-irrigation use:

(a) On the land to which the right is appurtenant.

(b) On any other land, subject to the provisions governing transportation of groundwater in article 8 of this chapter,[1] except that, if the land to which the right is appurtenant is included within the exterior boundaries of the service area of a city, town or private water company, use groundwater on other land only if the use on other land was commenced prior to the date of the designation of the active management area or is pursuant to a development plan filed with the director prior to the inclusion of the land within the exterior boundaries of the service area of the city, town or private water company.

2. Pursuant to § 45-473, convey retired irrigated land with the appurtenant type 1 non-irrigation grandfathered

[1] Section 45-541 et seq.

right. Any land not conveyed shall retain its appurtenant type 1 non-irrigation grandfathered right.

B. For the purposes of this section, "original owner" means:

1. The person who acquired and retired land from irrigation prior to the date of the designation of the active management area pursuant to § 45-463 and any person or entity who holds such land under the same ownership as defined by § 45-461.

2. The person who retires legally irrigated land after the date of the designation of the active management area pursuant to § 45-469 and any person or entity who holds such land under the same ownership as defined by § 45-461.

§ 45-471. Use of type 2 non-irrigation grandfathered right by owner

A. The owner of a type 2 non-irrigation grandfathered right pursuant to § 45-464 may use groundwater withdrawn pursuant to the right for any non-irrigation purpose at any location, subject to the provisions governing transportation of groundwater in article 8 of this chapter, except that, if the right is based on withdrawals of groundwater:

1. For the extraction or processing of minerals, the owner may use groundwater withdrawn pursuant to the right only for the purpose of mineral extraction or processing.

2. For the generation of electrical energy, the owner may use groundwater withdrawn pursuant to the right only for electrical energy generation.

B. If a type 2 non-irrigation grandfathered right is leased, the lessee may use groundwater withdrawn pursuant to the right subject to the provisions of subsection A of this section.

§ 45-472. Conveyance of irrigation grandfathered right; within service area; outside service area; change to non-irri-

gation grandfathered right; forfeiture of right to convey to non-irrigation use

A. The owner of an irrigation grandfathered right may convey the right only with the land to which the right is appurtenant.

B. If the land to which an irrigation grandfathered right is appurtenant is within the exterior boundaries of the service area of a city, town or private water company:

1. The irrigation grandfathered right may be conveyed only for an irrigation use, except for expanded animal industry use or as provided in paragraphs 2 and 3 of this subsection. If an irrigation grandfathered right is conveyed for an irrigation or expanded animal industry use, the full amount of the right is conveyed. The amount of groundwater conveyed pursuant to the right:

(a) For an irrigation use may be withdrawn by the new owner of the right only from the land to which the right is appurtenant and used on that land or on continguous irrigation acres under common ownership within the service area of the city, town or private water company, except that, if the groundwater was delivered by an irrigation district to the previous owner of the right, the irrigation district may continue to deliver groundwater to the new owner pursuant to the right for use on the land to which the right is appurtenant or on continguous irrigation acres under common ownership within the service area of the city, town or private water company. For purposes of this section, irrigation acres which are separated by a road, highway, easement or right-of-way from the land to which the irrigation grandfathered right is appurtenant are deemed to be contiguous.

(b) For an expanded animal industry use may be withdrawn by the new owner of the right only from the land to which the right is appurtenant and used on that land or on any other land, subject to the provisions of article 8 of this chapter relating to transportation of groundwater. If the groundwater was delivered by an irrigation district to the

previous owner of the right, the irrigation district may continue to deliver groundwater to the new owner pursuant to the right. If any portion of the amount of groundwater conveyed is withdrawn by the new owner and used on other land, no additional groundwater may be withdrawn for use on the land to which the right is appurtenant.

2. The irrigation grandfathered right may be conveyed to an industry engaged in the generation of electrical energy for the purpose of electrical energy generation, except that, if the facility for the generation of electrical energy is not subject to title 40, chapter 2, article 6.2,[1] the conveyance is subject to the approval of:

(a) The appropriate city or town, if the irrigation grandfathered right to be conveyed is appurtenant to land within the exterior boundaries of the service area of a city or town.

(b) The director, if the irrigation grandfathered right to be conveyed is appurtenant to land within the corporate limits of a city or town and within the exterior boundaries of the service area of a private water company.

3. If an irrigation grandfathered right is conveyed for a non-irrigation use pursuant to paragraph 2 of this subsection, the amount of the right that is conveyed is the lessor of:

(a) The current maximum amount of groundwater which may be used pursuant to the right, as calculated pursuant to § 45-465, subsection B.

(b) Three acre-feet per year multiplied by the number of water duty acres in the farm in which the acre to which the right is appurtenant is located divided by the number of irrigation acres in the farm.

4. The new owner of an irrigation grandfathered right conveyed pursuant to paragraph 2 of this subsection may withdraw the amount of groundwater conveyed pursuant to that right, as determined in paragraph 3 of this subsection, only from the land to which the right is appurtenant and use the groundwater on that land, but may not use the

[1] Section 40-360 et seq.

groundwater on other land, except that, if the groundwater was delivered by an irrigation district to the previous owner of the right, the irrigation distict may continue to deliver groundwater to the new owner pursuant to the right for use on the land to which the right is appurtenant.

C. If the land to which an irrigation grandfathered right is appurtenant is included within the exterior boundaries of the service area of a city, town or private water company subsequent to the date of the designation of an active management area, the owner of the right may, with the approval of the director and consistent with the provisions of this chapter, convey the grandfathered right for a non-irrigation use, other than an expanded animal industry use, on the land to which the right is appurtenant, upon a showing that adequate water service is unavailable at rates comparable to rates charged similar classes of water users within such service area. The amount of the right conveyed is determined pursuant to subsection B, paragraph 3 of this section.

D. If the land to which an irrigation grandfathered right is appurtenant is outside of the exterior boundaries of the service area of a city, town or private water company:

1. The irrigation grandfathered right may be conveyed for an irrigation use or a non-irrigation use. If an irrigation grandfathered right is conveyed for an irrigation or an expanded animal industry use, the full amount of the right is conveyed. If an irrigation grandfathered right is conveyed for a non-irrigation use, other than an expanded animal industry use, the amount of the right that is conveyed is the lesser of:

(a) The current maximum amount of groundwater which may be used pursuant to the right as calculated pursuant to § 45-465, subsection B.

(b) Three acre-feet per year multiplied by the number of water duty acres in the farm in which the acre to which the right is appurtenant is located divided by the number of irrigation acres in the farm.

2. The amount of groundwater conveyed pursuant to the right, as determined in paragraph 1 of this subsection, may be withdrawn by the new owner of the right only from the land to which the right is appurtenant and used on that land or on any other land, subject to the provisions of article 8 of this chapter[2] relating to transportation of groundwater, except that, if the groundwater was delivered by an irrigation district to the previous owner of the right, the irrigation district may continue to deliver groundwater to the new owner pursuant to the right. If any portion of the amount of groundwater conveyed is withdrawn by the new owner and used on other land, no additional groundwater may be withdrawn for use on the land to which the right is appurtenant, except that, if the new owner is an industry, it may withdraw a portion of the amount of groundwater conveyed for use on other land and withdraw the remainder of the amount of groundwater conveyed for municipal and industrial use on the land to which the right is appurtenant for purposes directly related to the industry's industrial operation.

E. For purposes of this section, "land to which the right is appurtenant" means the acre or group of contiguous acres conveyed with an irrigation grandfathered right.

F. If an irrigation grandfathered right is conveyed for a non-irrigation use, the new owner's right to withdraw or receive groundwater is a non-irrigation grandfathered right associated with retired irrigated land, or a type 1 non-irrigation grandfathered right. All subsequent conveyances of that right are governed by § 45-473.

G. The amount of a type 1 non-irrigation grandfathered right shall be determined at the time it is established and shall remain fixed at that amount.

H. If an irrigation grandfathered right has not been retired in anticipation of a future non-irrigation use and has

[2] Section 45-541 et seq.

not been exercised for five consecutive years, the right may not be conveyed for a non-irrigation use.

§ 45-473. Conveyance of type 1 non-irrigation grandfatherd[1] right; use by new owner; appurtenancy; within service area; outside service area

A. The owner of a type 1 non-irrigation grandfathered right may convey the right only for a non-irrigation use and only with the land to which it is appurtenant. For purposes of this section, a type 1 non-irrigation grandfathered right means a non-irrigation grandfathered right associated with retired irrigated land pursuant to § 45-463 or 45-469 or an irrigation grandfathered right which was conveyed for a non-irrigation use pursuant to § 45-472.

B. If a type 1 non-irrigation grandfathered right is conveyed, the full amount of the right is conveyed.

C. If the land to which a type 1 non-irrigation grandfathered right is appurtenant is within the exterior boundaries of the service area of a city, town or private water company, the amount of ground water conveyed pursuant to the right may be withdrawn by the new owner of the right only from the land to which the right is appurtenant. The groundwater may be used on the land to which the right is appurtenant, but may not be used on other land unless the use on other land was commended prior to the date of the designation of the active management area or was commenced by the original owner of the right pursuant to a development plan filed with the director prior to the inclusion of the land within the exterior boundaries of the service area of the city, town or private water company.

D. If the land to which the type 1 non-irrigation grandfathered right is appurtenant is outside of the exterior boundaries of the service area of a city, town or private water company, the amount of groundwater conveyed pursuant to the right may be withdrawn by the new owner of the right only from the land to which the right is appur-

tenant and used on that land or on any other land, subject to the provisions of article 8 of this chapter relating to transportation of groundwater. If any portion of the amount of groundwater conveyed is withdrawn by the new owner and used on other land, no additional groundwater may be withdrawn for use on the land to which the right is appurtenant, except that, if the new owner is an industry, it may withdraw a portion of the amount of groundwater conveyed for use on other land and withdraw the remainder of the amount of groundwater conveyed for municipal and industrial use on the land to which the right is appurtenant for purposes directly related to the industry's industrial operation.

E. For purposes of this section, "land to which the right is appurtenant" means the acre or group of contiguous acres conveyed with a type 1 non-irrigation grandfathered right.

F. If groundwater was delivered by an irrigation district to the previous owner of a type 1 non-irrigation grandfathered right, the irrigation district may contiue to deliver groundwater pursuant to the right to the new owner of the right.

---

[1] So in original. Probably should read "grandfathered".

§ 45-474. Conveyance of type 2 non-irrigation grandfathered right; amount

A. The owner of a type 2 non-irrigation grandfathered right may convey the right for any non-irrigation use except that:

1. A type 2 non-irrigation grandfathered right that is used for purposes of mineral extraction or processing may be conveyed only for a mineral extraction or processing use.

2. A type of 2 non-irrigation grandfathered right that is used for purposes of electrical energy generation may be

conveyed only for an electrical energy generation use.

B. A type 2 non-irrigation grandfathered right may not be conveyed for an irrigation use.

C. If a type 2 non-irrigation grandfathered right is conveyed, the full amount of the right is conveyed.

§ 45-475. Determinationn[1] of exterior boundaries of service area for purposes of conveyances

For purposes of conveyances of irrigation grandfathered rights and type 1 non-irrigation grandfathered rights, whether land to which the right is appurtenant is within the exterior boundaries of the service area of a city, town or private water company shall be determined as of the date of the closing of the conveyance transaction according to the most current map of the service area of the city, town or private water company available for public inspection on that date as required by § 45-498:

1. In the city clerk's office for a city.

2. In the town clerk's office for a town.

3. In the appropriate county recorder's office for a private water company.

---

[1] So in original. Probably should be "Determination".

§ 45-476. Application for certificate of grandfathered right

A. A person claiming the right to withdraw or receive and use groundwater pursuant to a grandfathered right shall file an application for a certificate of grandfathered right with the department not later than fifteen months after the date of the designation of the active management area on a form provided by the department.

B. The application for a certificate of grandfathered right not based upon prior proceedings on a certificate of exemption shall include the following:

1. The name and mailing address of the applicant.

2. The name of the active management area within which the withdrawal of groundwater pursuant to the claimed grandfathered right is being or has been made.

3. If the application is for a type 1 non-irrigation grandfathered right:

(a) The legal description and a map of the retired irrigated land in respect of which the right is claimed.

(b) The date when the irrigated land was retired.

(c) Such evidence as the director shall require that the retired irrigated land has been held under the same ownership since it was retired and that a development plan for the proposed non-irrigation use existed at the time the land was retired.

(d) If in a subsequent active management area, the amount of groundwater used per acre for the retired irrigated land each year during the five years preceding the time the land was retired.

4. If the application is for a type 2 non-irrigation grandfathered right:

(a) The maximum amount of groundwater legally withdrawn from land owned by the applicant and used in any one year during the five years preceding the date of the designation of the active management area.

(b) If the person withdrawing groundwater from the land owned by the applicant has made application for a type 1 non-irrigation grandfathered right, a copy of the application.

5. If the application is for an irrigation grandfathered right:

(a) The legal description and a map of all land owned by the applicant which was legally irrigated at any time during the five years preceding January 1, 1980 for initial active management areas or the date of the designation of the active management area for subsequent active management areas and the highest number of acres legally irri-

gated with groundwater at one time in any one year during the five-year period.

(b) The type of crops grown on such land and the cropping patterns used during the five-year period.

(c) The irrigation methods and devices currently being used in the irrigation of such land.

6. The location of each well from which groundwater is being or has been withdrawn by the applicant to irrigate such land.

7. The sworn statement that the information contained in the application is true and correct to the best knowledge and belief of the applicant.

8. Any other information the director may require.

C. A person or his successor claiming the right to use groundwater pursuant to a grandfathered right, described in whole or in part by a certificate or exemption, shall file an application for a certificate of grandfathered right as provided in subsection D and shall automatically be entitled to a certificate or certificates of grandfathered right for the portion of the grandfathered right claimed which is evidenced by the certificate of exemption or established by the proceedings on the certificate of exemption. Notice of the application is not required and hearings shall not be held. If the applicant claims grandfathered rights in addition to the amount of use described in the certificate of exemption, application for such additional amount shall be made pursuant to subsection B, and such application is subject to the notice, objection and hearing provisions applicable to applications made pursuant to that subsection.

D. The application for a certificate of grandfathered right based upon prior proceedings upon an application for a certificate of exemption shall include the following:

1. The name and mailing address of the applicant.

2. The name of the active management area within

which the withdrawal of groundwater pursuant to the claimed grandfathered right is being or has been made.

3. The total amount of groundwater to be withdrawn annually under the certificate of exemption.

4. The number of retired irrigated acres described in the application for a certificate of exemption.

5. Such evidence as the director shall require that the retired irrigated land has been held under the same ownership since it was retired.

6. The number of the certificate of exemption and a copy of the certificate of exemption.

7. The sworn statement that the information contained in the application is true and correct to the best knowledge and belief of the applicant.

8. Any other information the director may require.

§ 45-477. Waiver and relinquishment of grandfathered right

A person who claims the right to withdraw or receive and use groundwater pursuant to a grandfathered right but who fails to file an application for a certificate of grandfathered right as provided in this article is deemed to waive and relinquish any right to withdraw or receive and use groundwater pursuant to this article.

§ 45-478. Notice of requirement to apply for certificate of grandfathered right

A. Within ninety days of the date of the designation of an active management area, the director shall give notice of the requirement to apply for a certificate of grandfathered right to the clerk of the board of supervisors of the county or counties in which the active management area is located and to the mayor of each city or town, to each private water company and to the presiding officer of each political subdivision established pursuant to chapter 4, 5, 6 or 7 of this title[1] located in the active management area.

[1] Section 45-901 et seq., 45-1201 et seq., 45-1501 et seq., or 45-1901 et seq.

B. The director shall mail by January 1, following the date of the designation of the active management area, a copy of a written notice of the requirement to apply for a certificate of grandfathered right to each owner of real property within the active management area listed on the tax rolls of the county, except owners of real property located in vacant subdivisions or located within the service area of cities, towns and private water companies, along with a declaration that it is the duty of the recipient to forward the notice to the beneficial owner of the property. The notice shall include a statement that a person who fails to apply for a certificate of grandfathered right within an active management area waives and relinquishes any right to withdraw or receive and use groundwater pursuant to a grandfathered right.

C. The director shall also notify owners of real property located within service areas of cities, towns and private water companies and irrigation districts who utilize their own well, according to the registration of the well pursuant to article 10 of this chapter. The director may extend for a reasonable time the deadline for applications under this subsection.

D. The director may also give written notice in any other manner which will carry out the purposes of this section.

§ 45-479. Registry of applications for certificates; written objections; request for hearing

A. The director shall establish a registry of all applications received for a certificate of grandfathered right for each active management area. After the deadline for the filing of applications has passed, the director shall notify all applicants for a certificate of grandfathered right that the registry is available in the offices of the department for public inspectDon during regular business hours.

B. Within one hundred eighty days of the date of the notice required by subsection A, any person residing in the

active management area may file a written objection to any application for a certificate of grandfathered right and may request a hearing on the application. Objections may be made only on the basis that the information in the application is incorrect or is insufficient to issue a certificmte.

§ 45-480. Review of applications; investigations; hearings; final determination; appeal

A. The director shall review each application for a certificate of grandfathered right and may conduct such investigations as deemed necessary to determine whether the information contained in the application is correct and sufficent to issue a certificate. Except as provided in § 45-476, subsection C, the director may in appropriate cases, including cases in which a written objection has been filed, hold a hearing to determine whether the information contained in the application is correct and sufficient to issue a certificate. Thirty days prior to the date of the hearing, the director shall give notice of the hearing to the applicant and any person who has filed an objection to the application.

B. If a hearing is held, it shall be conducted by a department hearing officer in the active management area in which the use is located. The proceedings shall be recorded manually or electronically and shall be transcribed on request and at the expense of the requesting party. A hearing shall be conducted in an informal manner without adhering to the rules of evidence required in judicial proceedings. All parties, including the department, shall have an opportunity to present evidence and argument on all issues involved and to be represented by counsel. The hearing officer shall issue findings and recommend a decision to the director. The director shall issue a decision and an order either affirming or modifying the hearing officer's determination within six months of the notice of the hearing.

C. If the director determines that the information contained in the application is correct and is sufficient to issue

a certificate of grandfathered right, the director shall issue a certificate of grandfathered right to the applicant pursuant to § 45-481. If the director determines that the information contained in the application is incorrect or is insufficient to issue a certificate, the director may return the application specifically stating the reasons for its return. The applicant may reapply within thirty days of receipt of the returned application. A reapplication relates back to the filing of the original application but otherwise shall be treated as a new application.

D. If the director determines that the applicant is not entitled to a certificate of grandfathered right or determines that the amount of a type 1 or type 2 non-irrigation grandfathered right is less than that requested in the application, the director shall hold a hearing pursuant to subsection B of this section.

E. The applicant or any person entering an objection to the application may appeal to the superior court in the county in which the irrigated land or non-irrigation use is located pursuant to § 45-405.

§ 45-481. Issuance of certificates; contents; recordation

A certificate of grandfathered right shall be issued in recordable form and shall contain:

1. The name and mailing address of the person to whom the certificate is issued.

2. The active management area in which the withdrawal of groundwater is being or will be made.

3. The type of grandfathered right represented by the certificate.

4. If the certificate is for a type 1 non-irrigation grandfathered right, the amount of the right and the legal description of the retired irrigated land to which the right is appurtenant.

5. If the certificate is for a type 2 non-irrigation grandfathered right, the amount of the right.

6. If the certificate is for an irrigation grandfathered right, the legal description of the irrigable land to which the right is appurtenant.

7. Where applicable, the location of each well from which groundwater is being withdrawn pursuant to the right at the time the certificate is issued.

8. Such other pertinent information as the director may determine.

§ 45-482. Registry of certificates of grandfathered right; reporting

A. The director shall establish and maintain a registry of certificates of grandfathered rights for each active management area. The registry shall include a copy of each certificate of grandfathered right in the active management area and such other pertinent information as the director determines is necessary.

B. A person to whom a certificate of grandfathered right is issued shall notify the director of a change in name or mailing address or a conveyance of the grandfathered right pursuant to §§ 45-472 through 45-474. A person to whom a grandfathered right is conveyed shall notify the director of the conveyance and shall furnish information as required by the director to keep the registry current and accurate. The director shall have continuing jurisdiction and shall issue revised certificates as necessary.

C. The director may require holders of certificates of grandfathered rights to file additional information with the annual report required by § 45-632 as necessary to keep the registry current and accurate. For purposes of this article, "holder" means a person to whom a certificate of grandfathered right is issued or a person to whom a grandfathered right is conveyed.

ARTICLE 6. GROUNDWATER RIGHTS AND USES WITHIN SERVICE AREAS

§ 45-491. Scope of article

In an active management area, a city, town, private water company or irrigation district may withdraw groundwater only pursuant to this article, except as provided by a grandfathered right.

§ 45-492. Withdrawals by cities, towns and private water companies within services areas; contract to supply groundwater

A. In an active management area, a city, town or private water company shall have the right to withdraw and transport groundwater within its service area for the benefit of landowners and residents within its service area, and the landowners and residents are entitled to use the groundwater delivered, subject to:

1. The provisions of article 8 of this chapter[1] relating to transportation of groundwater.

2. Conservation requirements developed by the director pursuant to article 9 of this chapter.[2]

B. Claims of landowners to irrigation grandfathered rights or type 1 or 2 non-irrigation grandfathered rights shall be subject to the provisions of article 5 of this chapter.[3]

C. A city or town may contract to supply groundwater to a city, town or private water company in the same active management area if it is consistent with the management plan for the active management area and is approved by the director.

---

[1] Section 45-541 et seq.
[2] Section 45-561 et seq.
[3] Section 45-461 et seq.

§ 45-493. Limitations on extensions of service areas; prohibition on formation of private water company for irrigation purpose

A. In an active management area, the service area of a city, town or private water company may not be extended primarily for any of the following purposes:

1. Including a well field within the service area.

2. Furnishing disproportionately large amounts of water to an industrial or any other large water user unless it is consistent with the management plan for the active management area and is approved by the director.

3. Including irrigation acres within the exterior boundaries of the service area to extinguish the right to convey irrigation grandfathered rights to a non-irrigation use.

B. Within an active management area, a city, town or private water company may not extend its service area for the purpose of withdrawing and distributing groundwater for irrigation purposes.

C. Subsequent to the date of the designation of the active management area, a private water company may not be formed within an active management area to withdraw and distribute groundwater for irrigation purposes.

§ 45-494. Withdrawals by irrigation districts in initial active management areas

In an initial active management area established pursuant to § 45-411:

1. An irrigation district existing and engaged in the withdrawal, delivery and distribution of groundwater as of January 1, 1977 shall have the right, subject to § 45-496:

(a) To withdraw and transport groundwater within its service area for the benefit of landowners within its service area, and the landowners are entitled to use the groundwater deliverd, provided claims of landowners to irrigation

grandfathered rights or type 1 or 2 non-irrigation grandfathered rights shall be subject to the provisions of article 5 of this chapter.[1]

(b) If legally withdrawing and transporting groundwater from outside its service area for use within its service area as of January 1, 1977, to continue to withdraw and transport the amount of groundwater legally being withdrawn as of January 1, 1977.

2. An irrigation district which was not engaged in the withdrawal, delivery and distribution of groundwater as of January 1, 1977 shall be limited to the right, subject to § 45-496, to:

(a) Contract for surface water from a multi-county water conservation district and deliver and distribute such water within its service area for irrigation purposes.

(b) Contract to purchase, deliver and distribute effluent within its service area for irrigation purposes.

(c) Withdraw, deliver and distribute within its service area the amount of groundwater allowed by the current irrigation water duty of each member farm multiplied by the water duty acres in that farm less any portion of such amount withdrawn by individual members.

(d) Continue but not expand any non-irrigation water service being lawfully provided as of the date of the designation of the active management area, except as provided in § 45-497, subsection B.

[1] Section 45-561 et seq.

§ 45-494.01. Addition and exlcusion of area by irrigation districts in initial active management areas

A. In an initial active management area, an irrigation district established pursuant to chapter 6 of this title[1] existing and engaged in the withdrawal, delivery and distribution of groundwater as of January 1, 1977 may add to the service area of the district acres of land which have irrigation grandfathered rights to replace other lands that have

irrigation grandfathered rights of similar area for the purpose of maintaining the same acreage as of June 12, 1980, if both of the following apply:

1. The added and excluded acres are outside the exterior boundaries of the service area of an incorporated city or town.

2. The added and excluded acres are either within the franchised area of a private water company designated as having an assured water supply pursuant to § 45-576, subsection D and the contiguous acres may, in the judgment of the director, be added without adversely affecting the assured water supply of the private water company.

B. No greater quantity of water may be transported annually to the added acres than the annual stored surface water allotment for that year. For purposes of this section, stored surface water does not include central Arizona project allotment water. This section does not prohibit the transportation to the added acres of any quantity of floodwater or effluent available in addition to the stored surface water allotment.

---

[1] Section 45-1501 et seq.

§ 45-495. Withdrawals and transportations by irrigation districts within subsequent active management areas

In a subsequent active management area established pursuant to § 45-412:

1. An irrigation district existing and engaged in the withdrawal, delivery and distribution of groundwater as of the date of the designation of the active management area shall have the right, subject to § 45-496:

(a) To withdraw and transport groundwater within its service area for the benefit of landowners within its service area, and the landowners are entitled to use the groundwater delivered, provided claims of landowners to irrigation grandfathered rights or type 1 or 2 non-irrigation grand-

fathered rights shall be subject to the provisions of article 5 of this chapter.

(b) If legally withdrawing and transporting groundwater from outside its service area for use within its service area as of the date of designation of the active management area, to continue to withdraw and transport the amount of groundwater legally being withdrawn as of the date of the designation of the active management area.

2. An irrigation district which was not engaged in the withdrawal, delivery and distribution of groundwater as of the date of the designation of the active management area shall be limited to the right, subject to § 45-496, to:

(a) Contract for surface water and deliver and distribute such water within its service area for irrigation purposes.

(b) Contract to purchase, deliver and distribute effluent within its service area for irrigation purposes.

(c) Withdraw, deliver and distribute within its service area the amount of groundwater allowed by the current irrigation water duty of each member farm multiplied by the water duty acres in that farm, less any portion of such amount withdrawn by individual members.

(d) Continue but not expand any non-irrigation water service being lawfully provided as of the date of the designation of the active management area, except as provided in § 45-497, subsection B.

§ 45-496. Applicability of general transportation provisions and conservation requirements

Withdrawals and transportation of groundwater by an irrigation district pursuant to this article are subject to:

1. The provisions of article 8 of this chapter[1] relating to transportation of groundwater.

---

[1] Section 45-541 et seq.

2. Conservation requirements developed by the director pursuant to article 9 of this chapter.[2]

[2] Section 45-561 et seq.

§ 45-497. Withdrawal of groundwater by irrigation districts for municipal or industrial purposes

A. This article shall not be construed to enlarge the authority of an irrigation district to withdraw and distribute groundwater for municipal or industrial purposes.

B. An industrial user may not obtain groundwater delivery service from an irrigation district in excess of the amount it was entitled to receive on the date of the designation of the active management area unless the industrial user has acquired a grandfathered right or has obtained a general industrial use permit pursuant to § 45-515. An industrial user that has been issued a general industrial use permit pursuant to § 45-515 may, at any time, elect to receive groundwater from an irrigation district in the amount specified in the permit if:

1. The director approves the delivery to such groundwater.

2. The irrigation district agrees to deliver such groundwater.

3. The industrial use is located within the exterior boundaries of the service area of the irrigation district.

4. The terms of the permit are modified pursuant to § 45-525.

§ 45-498. Maps of service areas

A. Each city, town, private water company and irrigation district in an active management area shall maintain a current map clearly delineating its service area and distribution system in the director's office and shall furnish such other related data as the director may require. In addition:

1. Each city and town shall maintain a current map of its service area and distribution system in its city or town clerk's office.

2. Each private water company and irrigation district shall maintain a current map of its service area and distribution system in its offices.

B. All maps required by this section shall be available for examination by the public at reasonable times.

ARTICLE 7.
GROUNDWATER WITHDRAWAL PERMITS

§ 45-511. Definitions

In this article, unless the context otherwise requires:

1. "General industrial use" means a non-irrigation use of groundwater except those subject to permits issued pursuant to §§ 45-513 and 45-514 and those for which a certificate of assured water supply is required pursuant to § 45-576. General industrial use includes animal industry use.

2. "Permit" means a permit to withdraw groundwater which is issued by the director pursuant to this article.

§ 45-512. Categories of groundwater withdrawal permits

Except as provided in § 45-452, subsection H and article 5 and 6 of this chapter, a person may not withdraw groundwater from a nonexempt well in an active management area unless the person obtains a groundwater withdrawal permit from the director pursuant to this article. The categories of groundwater withdrawal permits are as follows:

1. Dewatering permits issued pursuant to § 45-513.

2. Mineral extraction and metallurgical processing permits issued pursuant to § 45-514.

3. General industrial use permits issued pursuant to § 45-515.

4. Poor quality groundwater permits issued pursuant to § 45-516.

5. Temporary permits issued pursuant to §§ 45-517 and 45-518.

6. Drainage water permits issued pursuant to § 45-519.

§ 45-513. Dewatering permit; priorities for use of groundwater; conditions on director; duration of permit

A. A person who is engaged in or proposes to engage in the extraction and processing of minerals shall be issued a dewatering permit for the beneficial use of the land for mineral extraction, metallurgical processing and for compliance with applicable environmental controls. For purposes of this section, "dewatering" means the withdrawal of groundwater from pits, from in, under and around ore bodies in proximity to pits and from underground workings. Dewatering does not include process water and tailing water recovered from or pumped from beneath tailing ponds, and a permit is not required therefore if such water is recycled into the extraction or metallurgical process.

B. Groundwater withdrawn pursuant to a dewatering permit shall be used in the following order of priority:

1. To meet mineral extraction, metallurgical processing and environmental control requirements of the permittee.

2. To a city, town, private water company or farm and any other person whose respective ability to withdraw groundwater has been adversely affected by a dewatering permit. Such water shall be equitably allocated by the director without costs but subject to the conditions set forth in subsection C of this section among such persons adversely affected by such dewatering. A person who receives an allocation of water under this paragraph shall reduce his

groundwater withdrawals by the amount of water he receives under this paragraph. A person receiving water under this paragraph does not thereby forfeit or abandon his right to withdraw groundwater.

3. For municipal, commercial, domestic and industrial needs of communities and residential areas directly related to the mineral extraction and metallurgical processing operation of the permittee.

4. To irrigate land owned or controlled by the permittee which is entitled to the use of groundwater for irrigation.

5. To the director for such distribution as will best achieve the goals and purposes of the management plan for the active management area.

6. For such other legal purpose as the permittee elects.

C. Groundwater made available to the director for distribution or allocation under this section is subject to the following conditions:

1. The permittee shall deliver the groundwater to the boundary of his property but shall not be obligated to deliver it further.

2. The permittee shall not be required to treat the chemical quality of the groundwater for distribution or allocation.

3. The permittee shall not be required to make the groundwater available if dewatering ceases, or if all or any portion of the groundwater is needed for a purpose having a higher priority as specified in subsection B of this section.

4. The person actually using the groundwater distributed or allocated by the director shall be responsible for paying any withdrawal fees required under § 45-611.

5. If the director sells water, proceeds shall be applied as follows:

(a) To cover costs, if any, of the director in delivering water to other users.

(b) To cover the permittee's cost in transporting water to the boundary of his property.

(c) To the active management area for general purposes as determined by the director.

D. A permit issued pursuant to this section shall be granted for a period of up to fifty years, subject to renewal under the same criteria used in granting the original permit.

§ 45-514. Mineral extraction and metallurgical processing permit; conditions for issuance; duration of permit

A. A person who is engaged in or proposes to engage in the extraction and processing of minerals shall be issued a permit to withdraw groundwater in the required amount, if all of the following apply:

1. The amount of groundwater available for mineral extraction, metallurgical processing and compliance with applicable environmental controls under a dewatering permit is insufficient.

2. Uncommitted municipal and industrial central Arizona project water is not available at the point where the operator's wellhead or distribution system would otherwise be, at a cost which does not exceed the current municipal and industrial central Arizona project delivery rates.

3. Other surface water of adequate quality or effluent of adequate quality is not available at the point where the operator's wellhead or distribution system would otherwise be, at a cost, including treatment costs, which does not exceed by twenty-five per cent the cost the operator would otherwise incur in withdrawing groundwater.

B. A permit issued pursuant to this section shall be granted for a period of up to fifty years, subject to renewal under the same criteria used in granting the original permit.

C. If, during the duration of a mineral extraction and metallurgical processing permit, the director determines

that uncommitted municipal and industrial central Arizona project water is available or surface water of adequate quality or effluent of adequate quality is available to the permittee at a cost comparable to groundwater, the director may require the permittee to use such water in lieu of groundwater.

§ 45-515. General industrial use permits; conditions for issuance; duration of permit

A. The director shall issue a permit to withdraw groundwater from a point outside of the exterior boundaries of the service area of a city, town or private water company for a general industrial use outside of the exterior boundaries of such service area if the director determines that all of the following apply:

1. Uncommitted municipal and industrial central Arizona project water is not available at the point where the operator's wellhead or distribution system would otherwise be, at a cost which does not exceed the current municipal and industrial central Arizona project rates.

2. Other surface water of adequate quality or effluent of adequate quality is not available at the point where the operator's wellhead or distribution system would otherwise be, at a cost, including treatment costs, which does not exceed by twenty-five per cent the cost the operator would otherwise incur in withdrawing groundwater.

3. Irrigation grandfathered rights are not available for purchase at a reasonable price or cannot be acquired by eminent domain.

4. The intended general industrial use, if located within three miles of the exterior boundaries of the service area of a city, town or private water company, has been denied service by the city, town or private water company at the customary rate in the customary manner. The requirement

of this paragraph does not apply to an expanded animal industry use.

5. The management plan for the active management area can be adjusted to accommodate the intended general industrial use consistent with the achievement of the overall management goal of the active management area.

6. There is an assured water supply for the intended use at the intended point of withdrawal. For purposes of this section, "assured water supply" means sufficient groundwater of adequate quality will be available to the applicant to satisfy the projected general industrial use for the duration of the pejmit.

B. A permit issued pursuant to this section shall e granted for a period of up to fifty years, subject to renewal under the same criteria used in granting the original permit.

C. If, during the life of the permit, the director determines that uncommitted municipal and industrial central Arizona project water is available or other water or effluent of adequate quality is available at a cost comparable to groundwater, the director may require the permittee to use such water in lieu of groundwater.

§ 45-516. Poor quality groundwater withdrawal permit; conditions for issuance; duration of permit

A. The director may issue a permit to a non-irrigation user to withdraw poor quality groundwater if he determines that the groundwater to be withdrawn because of its quality has no other beneficial use at the present time and that the withdrawal of such groundwater is consistent with the management plan.

B. A permit issued pursuant to this section may be issued for a period of up to thirty-five years, subject to subsection C. The director shall determine the duration of the permit

on the basis of the estimated life of the source of poor quality groundwater.

C. The director shall monitor withdrawals of groundwater pursuant to poor quality groundwater withdrawal permit and shall terminate the permit if the conditions specified in subsection A no longer apply.

§ 45-517. Temporary permit for electrical energy generation; conditions for issuance

A. The director shall, upon an adequate showing that an emergency exists, issue a temporary permit to a person engaged in the generation of electrical energy to withdraw groundwater in excess of the amount of groundwater the person is legally entitled to withdraw under a grandfathered right or other groundwater withdrawal permit.

B. A person may withdraw groundwater in excess of the amount he is legally entitled to withdraw before a permit is issued pursuant to this section. Such person, as soon as reasonably practicable after such withdrawals of groundwater commence, shall submit evidence to the director that an emergency exists.

C. The director shall monitor withdrawals of groundwater pursuant to a temporary permit and shall terminate the permit when the emergency ends.

§ 45-518. Temporary dewatering permit; conditions for issuance; duration of permit

A. The director may issue a temporary permit to a person to withdraw groundwater for dewatering purposes if the director determines that:

1. Dewatering is necessary for the beneficial use of the land from which the groundwater is proposed to be withdrawn.

2. Dewatering is consistent within the management plan for the active management area.

B. A permit issued pursuant to this section may be issued for a period of up to one year, subject to subsection C.

C. The director shall monitor withdrawals of groundwater pursuant to a temporary dewatering permit and shall terminate the permit if the conditions specified in subsection A no longer apply.

§ 45-519. Drainage water withdrawal permit; conditions for issuance

A. The director may issue a permit to a person to withdraw groundwater for drainage purposes if he determines that drainage of irrigated lands is necessary for a reasonable economic return from agricultural production in respect to those lands and the withdrawal of such groundwater is consistent with the management plan for an active management area.

B. The director shall monitor withdrawals of groundwater pursuant to a drainage permit and shall terminate the permit if the conditions for issuance specified in subsection A no longer apply. A permit issued pursuant to this section may be renewed subject to the same criteria used in granting the original permit.

§ 45-520. Point of withdrawal; location of use; conveyance

A. A person who withdraws groundwater under a permit issued pursuant to this article may change his point or points of withdrawal only pursuant to §§ 45-597 and 45-598 and may change his location of use only with the approval of the director and by applying for a modification of the permit pursuant to § 45-527.

B. A temporary permit issued pursuant to §§ 45-517 or 45-518 may not be conveyed. All other permits issued pursuant to this article may be conveyed only for the same use, subject to the approval of the director.

§ 45-521. Permit application form; filing; contents

Application for a permit to withdraw groundwater pursuant to this article shall be made on a form provided by the director which shall include the following information:

1. The name and mailing address of the applicant.

2. The name of the active management area and subbasin, if any, in which the applicant proposes to withdraw groundwater.

3. The name and mailing address of the owner of the land from which the applicant proposes with withdraw groundwater.

4. The legal description of the land on which the applicant proposes to use groundwater and the name and mailing address of the owner of such land.

5. The category of permit for which application is made.

6. The specific purposes for which the groundwater will be withdrawn.

7. The annual amount of groundwater, in acre-feet, for which application is made.

8. If the applicant proposes to withdraw groundwater from an existing well or wells, the location of each such well and the depth and diameter of each well and such other information the director requires.

9. If the applicant proposes to withdraw groundwater from a new well or wells, the proposed location of each such well and the depth and diameter proposed for each well and such other information the director requires.

10. If application is made for a dewatering permit pursuant to § 45-513:

(a) The estimated amount of groundwater necessary to meet mineral extraction and metallurgical processing requirements of the applicant.

(b) The estimated amount of groundwater necessary for municipal and industrial needs of communities and residential areas directly related to the mineral extraction and metallurgical processing operation of the applicant.

(c) The legal description of the acres of land owned or controlled by the applicant entitled to the use of groundwater for irrigation.

11. If application is made for a mineral extraction and metallurgical processing permit pursuant to § 45-514:

(a) The amount of groundwater available to the applicant under a dewatering permit previously obtained by the applicant.

(b) The estimated cost the applicant would incur in withdrawing groundwater at a point where his wellhead or distribution system would otherwise be.

12. If application is made for a general industrial use permit pursuant to § 45-515:

(a) The estimated cost the applicant would incur in withdrawing groundwater at the point where his wellhead or distribution system would otherwise be.

(b) Proof of denial of service or inaction on a service request by a city, town or private water company if the location of the applicant's intended use is within three miles of the exterior boundaries of the service area of such city, town or private water company. Such evidence is not required for an expanded animal industry use.

(c) Studies satisfactory to the director of the probable hydrologic impact on the groundwater resources which the applicant proposes to use including evidence of the availability of an assured water supply for the intended use.

13. If application is made for a temporary dewatering permit pursuant to § 45-518, evidence demonstrating that a temporary dewatering permit is necessary for beneficial use of the land from which the groundwater is proposed to be withdrawn.

14. If application is made for a drainage water permit pursuant to § 45-519:

(a) Evidence that drainage of the applicant's irrigated lands is necessary for a reasonable economic return from agricultural production on such lands.

(b) The legal description of the acres of land owned or controlled by the applicant entitled to the use of groundwater for irrigation.

15. A sworn statement that the information contained in the application is true and correct to the best belief and knowledge of the applicant.

16. Any other information which the director may require.

§ 45-522. Correction of application

Upon receipt of an application, the director shall endorse on the application the date of its receipt and keep a record of the application. If the director determines the application is incorrect or incomplete, the director shall return the application specifically stating the reasons for its return. A record shall be made of any application returned. The applicant may reapply and the reapplication shall be treated as a new application.

§ 45-523. Notice; objections; hearing

A. When the permit application is determined complete and correct, the director shall, within thirty days of such

determination, give notice of the application once each week for two consecutive weeks in a newspaper of general circulation in the county or counties in which the active management area in which the applicant proposes to withdraw groundwater is located.

B. Notice pursuant to subsection A of this section shall state that objections to the issuance of the permit may be filed, by persons residing in the active management area, in writing, with the director within thirty days after the last publication of notice and that objections are limited to whether the permit application meets the criteria for issuance of a permit as set forth in this article. An objection shall state the name and mailing address of the objector, be signed by the objector, his agent or attorney and clearly set forth reasons why the permit should not be issued.

C. In appropriate cases, including cases where a proper written objection to the permit application has been filed, the director may hold a hearing on the application. The director shall, thirty days prior to the date of the hearing, give notice in the manner described in subsection A of this section. The hearing shall be scheduled for not less than sixty days nor more than ninety days after the expiration of the time in which to file objections. A hearing shall be conducted as provided in § 45-480, subsection B.

§ 45-524. Approval or rejection of permit application

A. The approval or rejection of an application for a permit shall be endorsed on the application and dated. If the permit is denied, the director shall return the application to the applicant specifically stating the reasons for denial.

B. A permit issued by the director shall contain the following information.

1. The name and mailing address of the person to whom the permit is issued.

2. The name of the active management area and subbasin in which the groundwater may be withdrawn.

3. The category of permit issued.

4. The specific purpose for which the permit is issued.

5. The point or points of withdrawal of groundwater pursuant to the permit.

6. The legal description of the land on which the groundwater may be used.

7. The total annual amount of groundwater that may be withdrawn.

8. If groundwater is to be withdrawn from a new well or wells, the depth, diameter and general specifications for each such well.

9. The duration of the permit.

10. Conditions on the permit authorized by this chapter or rules or regulations adopted pursuant to this chapter and such other information as the director may determine.

§ 45-525. Registry of permits; reporting

A. The director shall establish and maintain a registry of permits for each active management area. The registry shall include a copy of each permit in the active management area and such other pertinent information as the director determines is necessary.

B. A person to whom a permit is issued shall notify the director of a change in name or mailing address, a change in point of withdrawal or a conveyance of a permit pursuant to § 45-520. A person to whom a permit is conveyed shall notify the director of the conveyance and shall furnish information as required by the director to keep the registry current and accurate. The director shall have continuing jurisdiction and shall issue revised permits as necessary.

C. The director may require holders of permits to file additional information with the annual report required by § 45-632 as necessary to keep the registry current and accurate. For purposes of this article, "holder" means a person

to whom a permit is issued or a person to whom a permit is conveyed.

§ 45-526. Appeals

A person whose application is denied or a person who contested a permit by filing a proper objection pursuant to § 45-523 may appeal the decision as provided in § 45-405.

§ 45-527. Modification of permit

A permittee may seek modification of an unexpired groundwater withdrawal permit and renewal of a permit within six months prior to the date of the expiration of the permit. All permit modifications or renewal applications shall be treated in the same manner as the initial permit application and are subject to the same criteria used in issuing the initial permit.

§ 45-528. Revocation of permits

A. After a hearing in the manner provided in § 45-480, subsection B, the director may permanently, or temporarily, in whole or in part, revoke a groundwater withdrawal permit for any of the following reasons:

1. For a material false statement in an application to initiate, modify or renew a permit, or for a material false statement in any report required to be filed by a person withdrawing or using groundwater pursuant to the provisions of this chapter.

2. For violation of the terms of the permit.

3. For failure to exercise a permit for five or more consecutive years.

B. The director may revoke a groundwater withdrawal permit with the written consent of the permittee and in such case a hearing is not required.

ARTICLE 8. TRANSPORTATION OF GROUNDWATER

§ 45-541. Transportation within a sub-basin

A. Groundwater which is withdrawn pursuant to a grandfathered right or a groundwater withdrawal permit may be transported without payment of damages within a sub-basin of an active management area, subject to the limitations on location of use in §§ 45-472 and 45-473.

B. Groundwater which is withdrawn by a city, town or private water company within its service area may be transported without payment of damages within its service area within a sub-basin of an active management area.

C. Groundwater which is withdrawn by a city or town within its service area may be transported pursuant to a delivery contract authorized by § 45-492, subsection C, without payment of damages, within a sub-basin of an active management area.

D. Groundwater which is withdrawn by an irrigation district within its service area may be transported without payment of damages within its service area within a sub-basin of an active management area.

§ 45-542. Transportation between sub-basins or away from an active management area; irrigation grandfathered right; type 1 non-irrigation grandfathered right

A. Groundwater which is withdrawn pursuant to an irrigation grandfathered right may be transported between sub-basins of an active management area or away from an active management area, subject to the limitations on location of use in § 45-472.

B. Groundwater which is withdrawn pursuant to a type 1 non-irrigation grandfathered right may be transported between sub-basins of an active management area or away from an active management area, subject to the limitations on location of use in § 45-473.

C. Transportations of groundwater pursuant to this section are not subject to payment of damages if the amount transported does not exceed three acre-feet per acre per year withdrawn from retired irrigated land. Transportations of groundwater pursuant to an irrigation grandfathered right in excess of three acre-feet per acre per year withdrawn from retired irrigated land are subject to payment of damages.

§ 45-543. Transportation between sub-basins or away from an active management area; damages; non-irrigation grandfathered right not associated with retired irrigated land; service area withdrawals; permit

A. Groundwater may be transported between sub-basins of an active management area or away from an active management area, subject to payment of damages, if the groundwater is withdrawn:

1. Pursuant to a type 2 non-irrigation grandfathered right.

2. By a city, town or private water company within its service area and transported within its service area.

3. By an irrigation district within its service area and transported within its service area.

4. Pursuant to a groundwater withdrawal permit.

B. Groundwater which is withdrawn by a city or town within its service area may be transported pursuant to a delivery contract authorized by § 45-492, subsection C between sub-basins of an active management area and shall be subject to payment of damages unless the groundwater is withdrawn pursuant to a type 1 non-irrigation grandfathered right.

§ 45-544. Transportation in areas not subject to active management; damages

In areas outside of active management areas, groundwater may be transported:

1. Within a sub-basin of a groundwater basin or within a groundwater basin, if there are not sub-basins, without payment of damages.

2. Between sub-basins of a groundwater basin or away from a groundwater basin, subject to payment of damages.

§ 45-545. Damage rules applicable to all transportations of groundwater

A. In active management areas and in areas outside of active management areas, in any action to recover damages, neither injury to nor impairment of the water supply of any landowner shall be presumed from the fact of transportation.

B. In determining whether there has been injury and the extent of any injury, the court shall consider all acts of the person transporting groundwater toward the mitigation of injury including:

1. Retirement of land from irrigation.

2. Discontinuance of other preexisting uses of groundwater.

3. Water conservation techniques.

4. Procurement of additionl sources of water which benefit the active management area, sub-basin or landowners within the active management area or sub-basin.

C. The court may award reasonable attorney fees, expert witness expenses and fees and court costs to the prevailing party.

ARTICLE 9. MANAGEMENT

§ 45-561. Definitions

In this article, unless the context otherwise requires:

1. "Augmentation" means to supplement the water supply of an active management area and may include the importation of water into the active management area, storage of water or artificial groundwater recharge.

2. "Industrial use" means a non-irrigation use of water not supplied by a city, town or private water company, including animal industry use and expanded animal industry use.

3. "Intermediate water duty" means an irrigation water duty, as defined in § 45-402, which is established by the director during a management period to apply for a specific number of years during the management period.

4. "Management period" means a period of years prescribed by §§ 45-564 through 45-568 during which a prescribed management plan applies.

5. "Municipal use" means all non-irrigation uses of water supplied by a city, town, private water company or irrigation district.

6. "Safe-yield" means a groundwater management goal which attempts to achieve and thereafter maintain a long-term balance between the annual amount of groundwater withdrawn in an active management area and the annual amount of natural and artificial groundwater recharge in the active management area.

§ 45-562. Management goals for initial active management areas

A. The management goal of the Tucson, Phoenix and Prescott active management areas is safe-yield by January 1, 2025, or such earlier date as may be determined by the director.

B. The management goal of the Pinal active management area is to allow development of non-irrigation uses as provided in this chapter and to preserve existing agricultural economies in the active management area for as long as feasible, consistent with the necessity to preserve future water supplies for non-irrigation uses.

C. All initial active management areas are subject to all provisions of this chapter.

§ 45-563. Management plans in initial active management areas; management periods; general provisions

The director shall develop a management plan for each initial active management area for each of five management periods pursuant to the guidelines prescribed in §§ 45-564 through 45-568 and shall adopt the plans only after public hearings pursuant to §§ 45-570 and 45-571. The plans shall include a continuing mandatory conservation program for all persons withdrawing, distributing or receiving groundwater designed to achieve reductions in withdrawals of groundwater.

§ 45-564. Management plan for first management period; guidelines

A. For the first management period, 1980 to 1990, the director shall promulgate management plans for the Phoenix, Tucson and Prescott active management areas not later than January 1, 1983 and for the Pinal active management area not later than July 1, 1985. In each plan, the director shall establish:

1. An irrigation water duty for each farm unit in the active management area. The irrigation water duty shall be calculated as the quantity of water reasonably required to irrigate the crops historically grown in a farm unit and shall assume conservation methods being used in the state which would be reasonable for the farm unit including lined ditches, pump-back systems, land leveling and efficient application practices, but not including a change from flood irrigation to drip irrigation or sprinkler irrigation.

2. A conservation program for all non-irrigation uses of groundwater. For municipal uses, the program shall require reasonable reductions in per capita use and such other conservation measures as may be appropriate for individual users. For industrial uses including industrial uses within the exterior boundaries of the service area of a city, town, private water company or irrigation district, the

program shall require use of the latest commercially available conservation technology consistent with reasonable economic return.

3. Economically reasonable conservation requirements for the distribution of groundwater by cities, towns, private water companies and irrigation districts within their service areas.

B. Within thirty days after the management plan for the first management period is adopted, the director shall give written notice of:

1. The irrigation water duty for the farm unit to each person in the farm unit who is entitled to withdraw or receive groundwater pursuant to an irrigation grandfathered right and to each person distributing groundwater pursuant to an irrigation grandfathered right.

2. The municipal conservation requirements included in the management plan for reductions in per capita use and for the use of appropriate conservation measures by individual users to each person who is entitled to withdraw or distribute groundwater for municipal use in the active management area.

3. The industrial conservation requirements included in the management plan for each person who is entitled to withdraw or receive groundwater for an industrial use in the active management area.

4. The conservation requirements included in the management plan for the distribution of groundwater by cities, towns, private water companies and irrigation districts within their service areas to each city, town, private water company and irrigation district in the active management area.

C. All persons notified pursuant to subsection B of this section shall comply with the irrigation water duty or applicable conservation requirements within two years from the date of the notice, unless a person obtains a variance pursuant to § 45-574.

§ 45-565. Management plan for second management period; guidelines

A. For the second management period, 1990 to 2000, the director shall promulgate a management plan for each initial active management area not later than January 1, 1988. In each plan the director shall:

1. Establish a new irrigation water duty for each farm unit to be reached by the end of the second management period and may establish one or more intermediate water duties to be reached at specified intervals during the second management period. The irrigation water duty and any intermediate water duties shall be calculated as the quantity of water reasonably required to irrigate the crops historically grown in the farm unit and shall assume the maximum conservation consistent with prudent long-term farm management practices within areas of similar farming conditions, considering the time required to amortize conservation investments and financing costs.

2. Establish additional conservation requirements for all non-irrigation uses of groundwater and a schedule for compliance with those requirements. For municipal uses, the program shall require additional reasonable reductions in per capital use to those required in the first management period and use of such other conservation measures as may be appropriate for individual users. For industrial uses including industrial uses within the exterior boundaries of the service area of a city, town, private water company or irrigation district, the program shall require use of the latest commerically available conservation technology consistent with reasonable economic return.

3. Establish additional economically reasonable conservation requirements for the distribution of groundwater by cities, towns, private water companies and irrigation districts within their service areas.

4. Include a program for augmentation of the water supply of the active management area including incentives for

articificial groundwater recharge.

5. In cooperation with the department of health services, include an assessment of groundwater quality in the active management area and any proposed program for groundwater quality protection. Any such program shall be submitted to the legislature for any ncessary enabling legislation or coordination with existing programs of the department of health services.

B. Within thirty days after the management plan for the second management period is adopted, the director shall give written notice in the manner and to the persons prescribed in § 45-564, subsection B.

C. All persons notified pursuant to subsection B of this section shall comply with the irrigation water duty or applicable conservation requirements for the second management period not later than January 1, 2000, unless the person obtains a variance pursuant to § 45-574. If an intermediate water duty has been established, a person who is entitled to withdraw or receive groundwater pursuant to an irrigation grandfathered right shall comply with the intermediate water duty not later than the compliance date specified in the management plan, unless the person obtains a variance pursuant to § 45-574.

§ 45-566. Management plan for third management period; guidelines

A. For the third management period, 2000 to 2010, the director shall promulgate a management plan for each initial active management area not later than January 1, 1998. In each plan the director:

1. Shall establish a new irrigation water duty for each farm unit to be reached by the end of the third management period and may establish one or more intermediate water duties to be reached at specified intervals during the third management period. The irrigation water duty or intermediate water duties for the third management period shall be

calculated as the quantity of water reasonably required to irrigate the crops historically grown in the farm unit and shall assume the maximum conservation consistent with prudent long-term farm management practices within areas of similar farming conditions, considering the time required to amortize conservation investments and financing costs. In setting the irrigation water duty or intermediate twenty-five per cent of the water duties within the sub-basin to more clearly reflect the average of the middle fifty per cent of the water duties within the sub-basin.

2. Shall establish additional conservation requirements for all non-irrigation uses of groundwater and a schedule for compliance with those requirements. For municipal uses, the program shall require additional reasonable reductions in per capita use to those required in the second management period and use of such other conservation measures as may be appropriate for individual users. For industrial uses including industrial uses within the exterior boundaries of the service area of a city, town, private water company or irrigation district, the program shall require use of the latest commercially available conservation technology consistent with reasonable economic return.

3. Shall establish additional economically reasonable conservation requirements for the distribution of groundwater by cities, towns, private water companies and irrigation districts within their service areas.

4. Shall include a program for additional augmentation of the water supply of the active management area, if feasible, including incentives for artificial groundwater recharge.

5. Shall, in cooperation with the department of health services, include an assessment of groundwater quality in the active management area and any proposed program for groundwater quality protection. Any such program shall be submitted to the legislature for any necessary enabling legislation or coordination with existing programs of the department of health services.

6. May include a program for the purchase and retirement of grandfathered rights by the department to begin no earlier than January 1, 2006.

B. Within thirty days after the management plan for the third management period is adopted, the director shall give written notice in the manner and to the persons prescribed in § 45-564, subsection B.

C. All persons notified pursuant to subsection B of this section shall comply with the irrigation water duty or applicable conservation requirements for the third management period not later than January 1, 2010, unless the person obtains a variance pursuant to § 45-574. If an intermediate water duty has been established, a person who is entitled to withdraw or receive groundwater pursuant to an irrigation grandfathered right shall comply with the intermediate water duty not later than the compliance date specified in the management plan unless the person obtains a variance pursuant to § 45-574.

§ 45-567. Management plan for fourth management period; guidelines

A. For the fourth management period, 2010 to 2020, the director shall promulgate a management plan for each initial active management area not later than January 1, 2008. The plans may include, where feasible:

1. A new irrigation water duty or intermediate water duties.

2. Additional conservation requirements for non-irrigation uses and a schedule for compliance with those requirements.

3. Additional economically reasonable conservation requirements for the distribution of groundwater by cities, towns, private water companies and irrigation districts within their service areas.

4. A program for additional augmentation of the water

supply of the active management area including incentives for artififical groundwater recharge.

5. In cooperation with the department of health services, an assessment of groundwater quality in the active management area and any proposed program for groundwater quality protection. Any such program shall be submitted to the legislature for any necessary enabling legislation or coordination with existing programs of the department of health services.

6. A program for purchase and retirement of grandfathered rights by the department.

B. Within thirty days after the management plan for the fourth management period is adopted, the director shall give written notice in the manner and to the persons prescribed in § 45-564, subsection B.

C. All persons notified pursuant to subsection B of this section shall comply with the irrigation water duty or applicable conservation requirements for the fourth management period not later than January 1, 2020, unless the person obtains a variance pursuant to § 45-574. If intermediate water duties have been established, a person who is entitled to withdraw or receive groundwater pursuant to an irrigation grandfathered right shall comply with those water duties as of the date specified for compliance in the management plan, unless the person obtains a variance pursuant to § 45-574.

§ 45-568. Management plan for fifth management period; guidelines

A. For the fifth management period, 2020 to 2025, the director shall promulgate a management plan for each initial active management area not later than January 1, 2019 pursuant to the guidelines prescribed in § 45-567, subsection A.

B. Within thirty days after the management plans for the fifth management period is adopted, the director shall give written notice in the manner and to the persons prescribed in § 45-564, subsection B.

C. All persons notified pursuant to subsection B of this section shall comply with the irrigation water duty or applicable conservation requirements for the fifth management period not later than January 1, 2025.

§ 45-569. Management goals and management plans for subsequent active management areas

A. Within thirty days of the designation of a subsequent active management area pursuant to article 2 of this chapter[1], the director shall establish a management goal for the active management area and the number of years in which the goal is to be achieved.

B. Not later than two years after the designation of a subsequent active management area, the director shall promulgate an initial management plan for the active management area and may provide for subsequent management plans to be promulgated during the time set for achieving the management goal. If the director determines that active management is necessary to preserve the existing supply of groundwater for future needs or that land subsidence or fissuring is endangering property or potential groundwater storage capacity, the director, in developing the plan or plans, shall include measures for reducing groundwater withdrawals which follow as closely as practicable the program set forth in §§ 45-564 through 45-568. If the director determines that active management is necessary because the use of groundwater is resulting in actual or threatened groundwater quality degradation, the director shall, in cooperation with the department of health services, include in the plan or plans a program for prevention or amelioration of groundwater quality problems and a schedule for implementation of the proposed solutions. The director

shall submit such program to the legislature for any necessary enabling legislation or coordination with existing programs of the department of health services.

C. All management plans, including the management goal, for a subsequent active management area, shall be adopted only after public hearings pursuant to §§ 45-570 and 45-571.

---

[1] Section 45-411 et seq.

§ 45-570. Hearing on management plans; notice; procedures

A. The director shall hold a public hearing on each proposed management plan in each active management area prior to final adoption of the management plan.

B. The director shall give notice of the hearing within thirty days after the proposed managment plan is completed. The notice shall include a summary of the management plan, a map or a description of the boundaries of the active management area, and the time and place of the hearing. The notice shall be published once each week for two consecutive weeks in a newspaper of general circulation in each county in which the active management area is located.

C. The hearing shall be held at a location within the active management area as soon as practicable but no less than thirty days and no more than sixty days after the first publication of the notice of the hearing.

D. At the hearing, the director shall present data in support of the adoption of the proposed management plan. Any person may appear at the hearing either in person or by representative and submit oral or documentary evidence for or against the adoption of the management plan.

§ 45-571. Findings upon hearing; order for adoption of management plan; publication

A. Within thirty days after the hearing, the director

shall make and file in the department a written summary and findings with respect to matters considered during the hearing.

B. If in the findings the director decides to adopt the management plan, he shall make and file an order adopting the plan pursuant to the findings. If the director determines that modifications in the management plan are necessary, he shall make such modifications and make and file an order adopting the modified plan and include his reasons for the modifications.

C. A summary of the management plan, findings and order shall be published in the manner and for the length of time prescribed for the publication of notice of the public hearing, and the order is effective when published for the final time. The factual data compiled by the director, a transscript of the hearing, a copy of the findings and a copy of the management plan are public records of the department and shall be available for examination by the public during regular business hours.

§ 45-572. Modification of conservation program; notice

A. After a management plan is adopted, the director may modify the plan after public hearing pursuant to §§ 45-570 and 45-571, except that the director may modify an irrigation water duty or conservation requirement only if the director determines that extraordinary circumstances justify the modification.

B. Within thirty days after a modification of an irrigation water duty or conservation requirement is adopted, the director shall give written notice of the modification in the manner and to the persons prescribed in § 45-564, subsection B. Any aggrieved person may request an administrative review pursuant to § 45-575.

C. All persons notified pursuant to subsection B of this section shall comply with the modified irrigation water duty or modified conservation requirements not later than

the compliance date specified in the modification notice, unless the person obtains a variance pursuant to § 45-574.

§ 45-573. Water quality considerations; consultation with department of health services

The director shall consult with the department of health services on water quality considerations in developing and implementating management plans under this article.

§ 45-574. Variances; application; notice; hearing; issuance

A. A person who requires additional time to comply with an irrigation water duty or conservation requirement may apply to the director for a variance from the water duty or requirement within ninety days from the date of notice of the water duty or requirement. The application shall include the following:

1. The name and mailing address of the applicant.

2. The name of the active management area in which the use is located.

3. The amount of groundwater currently being withdrawn annually by the person.

4. The irrigation water duty or conservation requirement from which the variance is sought.

5. A general description of the economic circumstances preventing timely compliance with the irrigation water duty or conservation requirement and any information relevant to such circumstances.

6. The sworn statement that the information contained in the application is true and correct to the best belief and knowledge of the applicant.

7. Such other information as the director may require.

B. Upon receipt and filing of the application, the director shall, within thirty days of the filing, give written notice to the applicant by certified mail of the hearing on

the application. A hearing shall be conducted as provided in § 45-480, subsection B.

C. The director may grant a variance upon a showing of compelling economic circumstances.. The variance shall specify:

1. The amount of groundwater which may be withdrawn by the person during the variance period, or a schedule of intermediate water duties or conservation requirements to be reached at specified intervals during the variance period.

2. The duration of the variance, which may not exceed five years from the date of the director's final determination of the variance.

D. A party aggrieved by the director's decision may appeal the final determination of the director within thirty days to the superior court in the county in which the irrigated land or non-irrigation use is located pursuant to § 45-405.

§ 45-575. Administrative review of irrigation water duty and conservation requirements

A. Any aggrieved party may request an administrative review of the irrigation water duty or any conservation requirement not later than ninety days from the date of notice of such duty or requirement.

B. A hearing shall be conducted as provided in § 45-480, subsection B. At least thirty days prior to the hearing, the director shall give written notice to the aggrieved party by certified mail of the time and place for the hearing.

C. A party aggrieved by the director's decision may appeal to the superior court in the county in which the irrigated land or the non-irrigation use is located within thirty days of the final decision pursuant to § 45-405.

§ 45-576. Certificate of assured water supply; designated areas; exemptions

A. A person who proposes to offer subdivided or unsubdivided lands, as these terms are defined in § 32-2101, for sale or lease in an active management area shall apply for and obtain a certificate of assured water supply from the director prior to presenting the plat for approval to the city, town or county in which the land is located, where such is required, and prior to filing with the state real estate commissioner a notice of intention to offer such lands for sale or lease, pursuant to §§ 32-2181 and 32-2195.01, unless the subdivision is located within an area designated as having an assured supply pursuant to subsection D or E of this section.

B. A city, town or county may approve a subdivision plat only if the subdivider has obtained a certificate of assured water supply from the director unless the subdivision is located within an area designated as having an assured water supply pursuant to subsection D or E of this section. The city, town or ocunty shall note on the face of the approved plat that a certificate of assured water supply has been submitted with the plat or that the proposed subdivision is located within an area designated as having an assured supply, pursuant to subsection D or E of this section.

C. The state real estate commissioner may issue a public report authorizing the sale or lease of subdivided or unsubdivided lands only if the subdivider, owner or agent has obtained a certificate of assured water supply from the director, unless the lands are located within an area designated as having an assured water supply pursuant to subsection D or E of this section.

D. The director shall designate service areas of private water companies in active management areas where an assured water supply exists. An allocation for central Arizona project water by the United States secretary of the interior to a private water company is deemed a presumption of an assured water supply upon a finding by the director that the private water company has made an uncondi-

tional offer to enter into a contract for central Arizona project water sufficient to supply the intended use and is proceeding to develop the necessary delivery system and treatment works. The presumption of an assured water supply for a private water company ceases if the private water company refuses to enter into a contract for central Arizona project water during the contract period, as determined by the director. If a city or town acquires a private water company which has contracted for central Arizona project water, the city or town shall assume the private water company's contract for central Arizona project water.

E. The director may designate service areas of private water companies in active management areas where an assured water supply exists before an allocation of central Arizona project water as stated in subsection D of this section, on the written request of a person who proposes to offer for sale or lease subdivided or unsubdivided lands and the private water company that would serve the lands. The director shall determine in his best judgment whether, in addition to other available supplies, sufficient central Arizona project water will be allocated to the private water company to meet the water requirements of all existing development within its franchised area and the requirements of the specific proposed development or developments, taking into account the total request for central Arizona project water from all applicants, the reasonable foreseeability of an allocation by the secretary of the interior as recommended by the director and any need for reserving a portion of the total amount of central Arizona project water requested by all applicants in order to achieve the management goal within the active management area. The determination by the director shall be based upon a finding:

1. That the private water company has made an unconditional offer to enter into a contract for that amount of central Arizona project water determined by the director to be allocable.

2. That the private water company has submitted a plan generally describing the treatment works and facilities for the delivery and treatment of the central Arizona project water and a tentative schedule of major actions which the company will proceed with upon an allocation of central Arizona project water.

3. That the private water company will be able to finance and construct the necessary delivery system and treatment works.

4. If the method of delivery or treatment is by the use of works or facilities of another or by an exchange of water with another, either that there is an existing agreement for the use of the works or facilities or an exchange agreement or that there is a written understanding between the parties of the general terms and criteria for such use or exchange.

F. A determination by the director pursuant to subsection E of this section that a sufficient amount of central Arizona project water can be so allocated is deemed a conditional presumption of an assured water supply for all existing development within its franchised area and the proposed development or developments specified in the director's determination. At the time the secretary of the interior has ordered central Arizona project allocations for private water companies, the director's authority to make determinations which create conditional presumptions of assured water supply terminates. A conditional presumption created under this subsection terminates on the date of an allocation of central Arizona project water by the secretary of the interior to the private water company. Thereafter, the provisions of subsection D of this section apply.

G. The director shall designate service areas of cities and towns in active management areas where an assured water supply exists. If a city or town has received an allocation from the United States secretary of the interior for central Arizona project water, the service area and extensions of the service area of such city or town are deemed to have an

assured water supply. If the city or town refuses to enter into a contract for central Arizona project water during the contract period, as determined by the director, the determination that the city or town has an assured water supply is subject to review by the director and the director may determine that a city or town does not have an assured water supply within its service area. If a city or town enters into a contract for central Arizona project water, the service area and extensions of the service area of such city or town are deemed to continue to have an assured water supply until December 31, 2000. Commencing on January 1, 2001, the determination that the service area of a city or town has an assured water supply is subject to review by the director and the director may determine that a city or town does not have an assured water supply within its service area.

H. A map identifying and describing the designated service areas of cities, towns and private water companies where an assured water supply exists shall be on file in the department and shall be available for examination by the public during regular business hours. The director shall notify the mayors of all cities and towns in active management areas and the chairmen of the boards of supervisors of counties in which active management areas are located of the service areas where an assured water supply exists and any modification of such areas within thirty days of the designation or modification. Persons proposing to offer subdivided or unsubdivided lands located within such designated service areas for sale or lease are exempt from applying for and obtaining a certificate of assured water supply.

I. This section does not apply in the case of the sale of lands for developments which are subject to a mineral extraction and processing permit or an industrial use permit pursuant to §§ 45-514 and 45-515.

J. For purposes of this section, "assured water supply" means:

1. Sufficient groundwater or surface water of adequate

quality will be continuously available to satisfy the water needs of the proposed use for at least one hundred years;

2. The projected water use is consistent with the management plan and achievement of the management goal for the active management area; and

3. The financial capability has been demonstrated to construct the delivery system and any treatment works necessary to make the supply of water available for the proposed use.

§ 45-577. Application; hydrological study; review of application

A. The director shall prescribe the form of application for a certificate of assured water supply, to include, as applicable:

1. The legal description of the land.

2. The plats, plans and maps of the proposed development.

3. Information on the nature and magnitude of the proposed development, including the number of parcels, lots or dwelling units and the annual amount of water which will be required.

4. Evidence of contracts for the delivery of water and information relating to the terms of the contracts.

5. If groundwater is a proposed source of water:

(a) Evidence of ownership of any grandfathered rights pursuant to which groundwater may be withdrawn for the proposed development.

(b) The legal description of the location of any existing wells from which the applicant proposes to withdraw groundwater or the proposed location of new wells.

6. Evidence of the right to use surface water pursuant to chapter 1, article 2 of this title[1] pursuant to a judicial decree or pursuant to a right established prior to 1919.

7. Financing arrangements for the development and evidence of financial capability to construct the delivery system and any treatment works necessary to make the supply of water available for the proposed use.

8. A sworn statement that the information contained in the application is true and correct to the best knowledge and belief of the applicant.

9. Any other information which the director may require.

B. If groundwater is a proposed source of water, the applicant shall submit with the application for a certificate of assured water supply a copy of a hydrological study on the groundwater resources that demonstrates an assured supply for the proposed use. The director shall prescribe the contents of the study which is to be submitted with the application.

C. The director shall review and evaluate the application. The director may request additional information from the applicant and conduct independent investigations as may be necessary to determine whether an assured water supply exists.

---

[1] Section 45-131 et seq.

§ 45-578. Notice; objections; hearing; issuance of certificate; appeals

A. When the application for a certificate of assured water supply is determined complete and correct, the director shall, within fourteen days of such determination give notice of the application, once each week for two consecutive weeks in a newspaper of general circulation in the county or counties in which the active management area in which the applicant proposes to withdraw groundwater is located.

B. Notice pursuant to subsection A of this section shall state that objections to the issuance of the certificate may be filed by residents of the active management area, in writing, with the director within ten days after the last publication of notice. An objection shall state the name and mailing address of the objector, be signed by the objector, his agent or attorney and clearly set forth reasons why the certificate should not be issued. The grounds for objection are limited to whether the certificate application meets the criteria for determining an assured water supply set forth in § 45-576, subsection J.

C. In appropriate cases, including cases where a proper written objection to the certificate application has been filed, the director may hold a hearing on the application. The director shall, thirty days prior to the date of the hearing, give notice in the manner described in subsection A of this section. The hearing shall be scheduled for not less than thirty days nor more than sixty days after the expiration of the time in which to file objections. A hearing shall be conducted as provided in § 45-480, subsection B, except that the director shall issue a decision and order either affirming or modifying the hearing officer's determination within four months of the filing of the application.

D. Upon finding that an assured water supply exists for the proposed use, the director shall issue a certificate of assured water supply to the applicant. Upon finding that an assured water supply does not exist, the director shall deny the application and return it to the applicant.

E. An aggrieved party or a person who contested a certificate by filing a proper objection pursuant to subsection B of this section may, within thirty days of the final decision of the director, appeal the decision as provided in § 45-405.

ARTICLE 10. WELLS

§ 45-591. Definitions

In this article, unless the context otherwise requires:

1. "Existing well" means a well which was drilled prior to the effective date of this chapter and which is not abandoned or sealed or a well which was not completed on the effective date of this article[1] but for which a notice of intention to drill was on file with the Arizona water commission on such date.

2. "New well" means a well for which a notice of intention to drill or a permit is required pursuant to this article.

---

[1] June 12, 1980.

§ 45-592. Wells in general

A. A person may construct, replace or deepen a well in this state only pursuant to this article. The drilling of a well may not begin until all requirements of this article are met.

B. The director may adopt temporary rules to allow a person to construct, replace or deepen a well prior to the adoption of final rules and regulations pursuant to this article.

§ 45-593. Registration of existing wells; permanent record of all wells

A. The director shall adopt rules and regulations establishing procedures for registration of all existing wells in this state. Within two years of the effective date of this chapter, a person who owns an existing well shall register the well pursuant to the rules and regulations adopted by the director on a registration form provided by the director. The registration form shall include:

1. The registration number of any well previously required to be registered in the state prior to the effective date of this chapter.

2. The legal description of the land upon which the well is located, the location of the well on the land and the name and mailing address of the owner of the land.

3. The depth, diameter and type of casing of the well.

4. Such legal descripton of the land upon which the groundwater is being used as may be required by the director to administer this chapter.

5. The maximum pumping capacity of the well.

6. Any other information which the director may require.

B. The director shall assign a registration number to each well registered pursuant to this section and to all other wells drilled pursuant to this chapter and shall maintain a permanent record of registration numbers and all other information on new and existing wells pursuant to this chapter and previous law.

C. The person to whom a well is registered shall notify the director of a change in ownership of the well, and the new owners shall furnish information as required by the director to keep the department's well registration records current and accurate.

D. This article shall not be construed to legalize any well existing on the effective date of this article which was not in accordance with prior statutory law.

§ 45-594. Well construction standards

The director shall adopt rules and regulations establishing construction standards for new wells and replacement wells and the deepending and abandonment of existing wells. All well construction operations shall comply with the rules and regulations adopted pursuant to this section.

§ 45-595. Well construction requirements; licensing of well drillers and pump installation contractors

A. New well construction, including modifications of wells, shall be performed under the direct and personal

supervision of a well driller who holds a contractor's license pursuant to title 32, chapter 10, article 2[1] and a well driller's license pursuant to subsection B.

B. A person who intends to construct or modify one or more wells in this state and who possesses a contractor's license pursuant to title 32, chapter 10, article 2 shall file an application for a well driller's license with the director. The application shall include:

1. The name, mailing address, place of business and contractor's license number of the applicant.

2. The applicant's experience and qualifications.

3. Such other information as the director may require.

C. The director shall, by rule or regulation, establish qualifications and a reasonable fee of not more than fifty dollars for licenses for well drillers and establish procedures for the evaluation and licensing of applicants. A nontransferable well driller's license shall be issued if the director finds that the applicant meets the qualifications established pursuant to this subsection. The director may revoke a well driller's license for good cause.

D. A person who drills or modifies an exempt well on land owned by that person shall first obtain a single well license from the department. The department shall issue the license to drill the well according to standard small well construction standards. No fee may be charged for a single well license.

---

[1] Section 32-1121 et seq.

§ 45-595. Well construction requirements; licensing of well drillers and pump installation contractors

A. New well construction, including modifications of wells, shall be performed under the direct and personal supervision of a well driller who holds a well driller's license pursuant to subsection B.

B. A person who intends to construct or modify one or more wells in this state shall file an application for a well driller's license with the director. The application shall include:

1. The name, mailing address and place of business of the applicant.

2. The applicant's experience and qualifications.

3. Such other information as the director may require.

C. The director shall, by rule or regulation, establish qualifications and a reasonable fee of not more than fifty dollars for licenses for well drillers and establish procedures for the evaluation and licensing of applicants. A nontransferable well driller's license shall be issued if the director finds that the applicant meets the qualifications established pursuant to this subsection. The director may revoke a well driller's license for good cause.

§ 45-596. Notice of intention to drill

A. In an area not subject to active management, a person may not drill or cause to be drilled any well or deepen an existing well without first filing notice of intention to drill pursuant to subsection C.

B. In an active management area, a person may not drill or cause to be drilled an exempt well or a replacement well in approximately the same location or deepen an existing well without first filing notice of intention to drill pursuant to subsection C.

C. A notice of intention to drill shall be filed with the director on a form prescribed and furnished by the director which shall include:

1. The name and mailing address of the person filing the notice.

2. The legal description of the land upon which the well is proposed to be drilled and the name and mailing address of the owner of the land.

3. The legal description of the location of the well on the land.

4. The depth, diameter and type of casing of the proposed well.

5. Such legal description of the land upon which the groundwater is proposed to be used as may be required by the director to administer this chapter.

6. When construction is to begin.

7. The proposed uses to which the groundwater will be applied.

8. The name and well driller's license number of the well driller who is to construct the well.

9. The design pumping capacity of the well.

10. If for a replacement well, the maximum capacity of the original well and the distance of the replacement well from the original well.

11. Such other information as the director may require.

D. Notice of intention to drill shall be filed with the director in duplicate. Upon receiving the notice, the director shall record the notice and endorse the date of receipt and a filing number on the notice. Within fifteen days of the filing, the director shall mail the duplicate copy of the notice to the person giving the notice at the address stated in the notice. Upon receipt of a copy of the notice showing the record of receipt by the director and the filing of the notice, this section is deemed to have been fully complied with in respect to the drilling or deepening of the well described in the notice.

E. The well shall be completed within one year after the date of notice. If the well is not completed within one year, the person shall file a new notice before proceeding with further construction.

§ 45-597. Deepening and replacement of wells in active management areas; filing of notice

A. A person entitled to withdraw groundwater in an active management area may deepen an existing well or construct a replacement well at approximately the same location. The director shall by rule or regulation define what constitutes a replacement well, including the distance from the original well site that is deemed to be the same location for a replacement well.

B. Prior to deepening an existing well or constructing a replacement well at approximately the same location, the person shall file a notice of intention to drill pursuant to § 45-596 and provide the director with any other information as the director may by rules and regulations require.

§ 45-598. New wells and replacement wells in new locations in active management areas; rules and regulations; permit required

A. The director shall adopt rules and regulations governing the location of new wells and replacement wells in new locations in active management areas to prevent unreasonably increasing damage to surrounding land or other water users from the concentration of wells.

B. A person entitled to withdraw groundwater in an active management area pursuant to article 5 or 6 of this chapter[1] may construct a new well or a replacement well in a new location if the location of the new well or the replacement well complies with the rules and regulations adopted by the director pursuant to subsection A and if the person has applied for and received a permit from the director.

[1] Sections 45-461 et seq., 45-491 et seq.

§ 45-599. Permit application; contents; correction of defective application; issuance of permit

A. An application for a permit to construct a new well

or replacement well in a new location shall be made on a form prescribed and furnished by the director which shall include:

1. The name and mailing address of the applicant.

2. The legal description of the land upon which the new well is proposed to be constructed and the name and mailing address of the owner of the land.

3. The legal description of the proposed location of the new well on the land.

4. If for a replacement well, the legal description of the land upon which the original well is located, the name and mailing address of the owner of the land, the legal description of the location of the original well on the land, the depth and diameter of the original well and evidence of proper abandonment.

5. The depth, diameter and type of casing of the new well.

6. Such legal description of the land upon which the groundwater is proposed to be used as may be required by the director to administer this chapter.

7. When construction is to begin.

8. The proposed use of the groundwater to be withdrawn.

9. The design pumping capacity of the new well.

10. The name and well driller's license number of the well driller who is to construct the well.

11. Such other information including any maps, drawings and data as the director may require.

B. Upon receipt of a permit application, the director shall endorse on the application the date of its receipt. If the application is incorrect or incomplete, it shall be returned for correction or completion, endorsed with the reasons for its return. A record shall be made of all applicatons received and all applications returned.

C. The director shall approve an application for a permit for a new well or a replacement well in a new location if the proposed well complies with the rules and regulations adopted pursuant to § 45-598, subsection A.

D. The director shall record and endorse the approval or rejection of an application for a permit on the application and return a copy of the application to the applicant within fifteen days of receipt of the application. Upon approval, the director shall issue a permit and the applicant may proceed to construct the well. If the application is rejected, the applicant shall not proceed with construction of the well. The well shall be completed within one year of receipt of the permit. If the well is not completed within one year, the applicant shall file a new application before proceeding with construction.

E. The permit shall state the following:

1. The legal description of the land upon which the well may be constructed.

2. The legal description of the location of the new well on the land.

3. The depth and diameter of the well and type of casing.

4. The maximum pumping capacity of the well.

5. The legal description of the land upon which the groundwater will be used.

6. The use of the groundwater to be withdrawn.

§ 45-600. Filing of log by driller; filing of completion report

A. A well driller shall maintain a complete and accurate log of each well he drills. Within thirty days of completion of the drilling of any well in this state, the driller shall file a copy of the log of the well with the director, including information on the casing of the well and the capping applied, if it is an artesian well. The director shall prescribe well driller report forms and the department shall furnish them on request.

B. Within thirty days after the installation of pumping equipment in any well in this state, the driller shall file a completion report with the director. The director shall prescribe the completion report form and the department shall furnish them on request. The completion report form shall include:

1. The type of equipment installed.

2. Tested pumping capacity of the well in gallons per minute as determined for a non-flowing well by measuring the discharge of the pump after continuous operation for at least four hours, or for a flowing well by measuring the natural flow at the land surface.

3. Drawdown of the water level measured in feet for a non-flowing well after not less than four hours of continuous operation and while still in operation, or for a flowing well, the shut-in pressure measured in feet above the land surface or in pounds per square inch at the land surface.

4. Depth in feet from the land surface to the static groundwater level, measured immediately prior to the well-capacity test.

5. Such other information as the director may require.

§ 45-601. Operating regulations for multiple wells

The director may adopt rules and regulations governing pumping patterns of persons who withdraw groundwater from multiple wells in an active management area to minimize damage to adjacent groundwater users. The director may not require a person who withdraws groundwater from multiple wells to change his pumping patterns if the person or user cannot reasonably accommodate such changes.

§ 45-602. Capping of wells; waste

A. Groundwater which has been withdrawn shall not be allowed to waste. To effectuate the purpose of this section, the director shall:

1. Require all flowing wells to be capped or equipped

with valves so that the flow of water can be completely stopped when not in use.

2. Require both flowing and non-flowing wells to be constructed and maintained so as to prevent waste of groundwater through leaky casing, lack of casings, pipes, fittings, valves or pumps, either above or below the surface of the ground.

B. The reasonable withdrawal of groundwater for development, testing or repair of a well or the inadvertent loss of water due to breakage of a pump, valve, pipe or fitting is not waste if reasonable diligence is shown in effecting the necessary repairs.

§ 45-603. Criteria for rules and regulations

In developing rules and regulations under this article, the director shall consider, among other things, water quality, cones of depression and land subsidence.

§ 45-604. Water measuring devices

A. A person who withdraws groundwater from a non-exempt well in an active management area or an irrigation non-expansion area shall use a water measuring device approved by the director.

B. The director shall adopt rules and reuglations setting forth the requirements and specifications for water measuring devices.

ARTICLE II. FINANCIAL PROVISIONS

§ 45-611. Groundwater withdrawal fee; amounts and purposes of fee

The director shall levy and collect an annual groundwater withdrawal fee from each person withdrawing groundwater in an active management area in an amount not to exceed five dollars per acre-foot of groundwater withdrawn and

beneficially used. The actual amount of the fee shall be set by the director as follows:

1. For administration and enforcement of this chapter, an amount not less than fifty cents and not greater than one dollar per acre-foot per year. The initial fee for administration and enforcement shall be levied as soon as practicable after the effective date of this article.

2. For augmentation of the water supply of the active management area, an amount not greater than two dollars per acre-foot per year. The initial fee for augmentation shall be levied in the first year in which the director develops and implements an augmentation program as part of the management plan of the active management area.

3. For purchasing and retiring grandfathered rights, an amount not greater than two dollars per acre-foot per year. The initial fee for purchasing and retiring grandfathered rights shall be levied in the first year in which the director develops and implements a program for the purchase and retirement of grandfathered rights as part of the management plan for the active management area, but not earlier than January 1, 2006.

§ 45-612. Administration and enforcement withdrawal fee; exemption from lapsing; disposition of excess monies

A. Each year the legislature shall appropriate sufficient funds to the department to cover all costs of administration and enforcement of this chapter.

B. Not later than October 1 of each year, the director shall estimate the total amount of groundwater withdrawn in all active management areas during the following calendar year and set the administration and enforcement fee pursuant to § 45-611, paragraph 1 to produce an amount equal to one-half of the amount budgeted by the director for administration and enforcement purposes for the following fiscal year. In setting the administration and en-

forcement fee, the director shall account for excess payments or deficiencies in payments in the past fiscal year. Monies collected from administration and enforcement fees shall be deposited in the general fund.

C. Monies budgeted for administration and enforcement purposes pursuant to this section are exempt from lapsing under § 35-190. If the administration and enforcement fee is set at fifty cents and excess payments have been received, such excess payments shall be credited to the augmentation fund established under § 45-615 and credited among the active management areas in proportion to the amount of such monies collected form each active management area.

§ 45-613. Use of withdrawal fees collected for augmentation and purchase and retirement of grandfathered rights

Monies collected for purposes of augmentation and purchase and retirement of grandfathered rights under § 45-611, paragraphs 2 and 3 shall be used to finance programs only for the benefit of the active management area in which they are collected.

§ 45-614. Setting of groundwater withdrawal fee; statement entered in record; statement transmitted to state treasurer; notice; payment

A. The director, not later than October 1 each year, shall set the groundwater withdrawal fee for each active management area for the following calendar year. In setting the fee, the director shall consider, among other things:

1. The estimated financial requirements for the next fiscal year.

2. The estimated amount of groundwater which will be withdrawn in the active management areas in the next calendar year.

3. The amount of monies collected from groundwater withdrawal fees in the preceding calendar year.

4. Any monies expected to be available for use from the goundwater enforcement fund.

B. The director shall enter in the records of the department a statement of the estimated financial requirements for the next fiscal year and a statement of the groundwater withdrawal fees for each active management area for the next calendar year, itemized to show the amounts to be levied for administration and enforcement, augmentation and purchase and retirement of grandfathered rights. The director shall transmit to the state treasurer a copy of the itemized statement of the groundwater withdrawal fees.

C. Within thirty days after the director sets the groundwater withdrawal fees for the next calendar year, the director shall give notice of the fees by:

1. Giving written notice to the clerk of the board of supervisors of the county or counties in which the active management area is located and to the mayor of each city or town, to each private water company and to the presiding officer of each political subdivision established pursuant to chapter 4, 5, 6 or 7 of this title located in the active management area.

2. Written notice to all holders of groundwater withdrawal permits in the active management area.

D. The groundwater withdrawal fee shall be paid to the department at the time the person withdrawing groundwater files a report on annual groundwater withdrawals pursuant to § 45-632.

§ 45-615. Remittance of collections to state treasurer; divisions of collections into funds

The director shall remit all monies collected by the department pursuant to § 45-611, paragraphs 2 and 3 to the state treasurer who, based on the statement of the director transmitted pursuant to § 45-614, subsection B, shall divide the monies as follows:

1. Monies received for the purpose of augmentation of the water supply of the active management area shall be kept in an augmentation fund. The state treasurer shall maintain within the fund separate accounts for each active management area.

2. Monies received for the purpose of purchase and retirement of grandfathered rights shall be kept in a purchase and retirement fund. The state treasurer shall maintain within the fund separate accounts for each active management area.

ARTICLE 12. ENFORCEMENT

§ 45-631. Definition

In this article, unless the context otherwise requires, "person" means an individual, public or private corporation, company, partnership, firm, association, society, estate, trust, any other private organization or enterprise, the United States, any state, territory or country or a governmental entity, political subdivision or municipal corporation organized under or subject to the constitution and laws of this state.

§ 45-632. Records and annual report of groundwater pumping, transportation and use

A. Each person who is required to file an annual report under this section shall maintain current accurate records of his withdrawals, transportation and use of groundwater as prescribed by the director under subsection J.

B. Except as provided in subsection C, an annual report shall be filed with the director by each person who:

1. Withdraws groundwater in an active management area.

2. Uses groundwater in an active management area, not otherwise reported for such person in a form acceptable to the director.

3. Uses groundwater which is transported from an active management area.

C. Persons who withdraw groundwater from exempt wells and non-irrigation customers of cities, towns, private water companies and irrigation districts, except customers receiving water pursuant to a permit, are exempt from the record keeping and reporting requirements of this section for such water.

D. Persons who are required to report under subsection B, paragraph 1 shall report the following information for each well:

1. The registration number and location of the well.

2. The quantity of groundwater withdrawn from the well since the date of the preceding report.

3. The quantity of fuel or electricity consumed by the pump since the date of the preceding report.

4. The uses to which the groundwater was applied or the persons to whom the groundwater was delivered during the reporting period.

E. Persons who are required to report under subsection B, paragraph 2 or 3 shall report the following information:

1. The source of the groundwater, including:

(a) The name of the person from whom the groundwater was obtained.

(b) The registration number and location of the well, if known.

2. The quantity of groundwater used since the date of the preceding report.

3. The specific uses to which the groundwater was applied during the reporting period.

F. If a person both withdraws groundwater in an active management area and uses such water, he may combine the information required by subsections D and E into one report.

G. The director may require such other information in the report as may be necessary to accomplish the management goals of the applicable active management area.

H. Each report shall contain either a sworn statement or a certification, under penalty of perjury, that the information contained in the report is true and correct according to the best belief and knowledge of the person filing the report.

I. The annual report shall be maintained on a calendar year basis and shall be filed with the director no later than March 31.

J. The records and reports required to be kept and filed under this section shall be in such form as the director prescribes. The director shall prepare blank forms and distribute them on a timely schedule throughout each active management area and furnish them upon request. Failure to receive or obtain the forms does not relieve any person from keeping the required records or making any required report. The director shall cooperate with cities and towns, private water companies and irrigation districts in establishing the form of the records and reports to be kept and filed by them.

§ 45-633. Inspections; investigations and audits

A. The director or his authorized representative may enter at reasonable times upon private or public property where facilities for the withdrawal, transportation or use of groundwater are located, and the owner, manager or occupant of the property shall permit such entry, to:

1. Inspect the facilities for withdrawal, transportation or use of groundwater that are subject to this chapter.

2. Obtain factual data or access to records required to be kept under § 45-632.

3. Ascertain compliance with this chapter.

B. Inspections and investigations under subsection A of this section shall be upon reasonable notice to the owner,

manager or occupant of the property unless reasonable grounds exist to believe that such notice would frustrate the enforcement of this chapter or where entry is sought for the sole purpose of inspecting water measuring devices required pursuant to § 45-604. The director shall adopt regulations for conducting inspections, examining records and obtaining warrants pursuant to this section. The director may apply for and obtain warrants. If warrants are required by law, the director shall apply for and obtain warrants for entry and inspection to carry out the administrative and enforcement purposes of this chapter.

C. The director may require a person who is required to keep records under § 45-632 to appear, at reasonable times and upon reasonable notice, at the director's office and produce such records and information as are specified in the notice to determine whether the records and annual reports required by § 45-632 are complete, true and correct. The director shall audit the records of a sufficient number of persons under this subsection to ensure general compliance with this chapter.

The director shall provide a written report of each inspection, investigation and audit under this section to the person subject to such action.

§ 45-634. Cease and desist order; hearing; injunctive relief

A. If the director finds that a person is violating a provision of this chapter or the rules or regulations adopted pursuant to this chapter, the director may recommend the imposition of a civil penalty and shall issue a written notice for the violator to appear and show cause not less than fifteen days of receipt of the notice why he should not be ordered to cease and desist from such violation. Such notice shall inform the person of the time and place where he may appear to show cause and the consequences of his failure to appear.

B. After the cease and desist hearing, or after the expiration of the time to appear, the director shall issue a decision and order, which constitute the final action by the director.

The person affected may appeal the decision and order of the director to the superior court in the county in which the violation is alleged to have occurred pursuant to title 12, chapter 7, article 6.[1]

C. If the person continues the violation after the director's final decision and order is issued, the director may apply for a temporary restraining order or preliminary or permanent injunction from the superior court according to the Arizona Rules of Civil Procedure. A decision to seek injunctive relief does not preclude other forms of relief or enforcement against the violator.

---

[1] Section 12-901 et seq.

§ 45-635. Violation; civil penalties

A. A person who is determined pursuant to § 45-634 to be in violation of this chapter or a permit, rule, regulation or order issued or adopted pursuant to this chapter may be assessed a civil penalty in an amount not exceeding:

1. One hundred dollars per day of violation not directly related to illegal withdrawal, use or transportation of groundwater.

2. Ten thousand dollars per day of violation directly related to illegal withdrawal, use or transportation of groundwater.

B. An action to recover penalties under this section shall be brought by the director in the superior court in the county in which the violation occurred.

C. In determining the amount of the penalty, the court shall consider the degree of harm to the public, whether the violation was knowing or wilful, the past conduct of the defendant, whether the defendant should have been on notice of the violation, whether the defendant has taken steps to cease, remove or mitigate the violation and any other relevant information.

§ 45-636. Violation; classification

A. Unless otherwise specified, a person who knowingly

violates or refuses to comply with a provision of this chapter or a permit, rule, regulation or order issued or adopted pursuant to this chapter is guilty of a class 2 misdemeaner. A person who, after notice of violation, continues in violation of a provision of this chapter or a permit, rule, regulation or order issued or adopted pursuant to this chapter is guilty of a separate offense for each day of violation.

B. A person who knowingly falsifies or renders inaccurate a measuring device required to be installed or maintained under this chapter is guilty of a class 6 felony.

C. A person who knowingly and intentionally withdraws or uses groundwater in violation of this chapter is guilty of:

1. A class 6 felony if the amount of groundwater illegally withdrawn or used is one thousand acre-feet or more.

2. A class 1 misdemeanor if the amount of groundwater illegally withdrawn or used is more than one hundred acre-feet but less than one thousand acre-feet.

3. A class 3 misdemeanor if the amount of groundwater illegally withdrawn or used is one hundred acre-feet or less.

§ 45-637. Groundwater enforcement fund

A. There shall be established a permanent groundwater enforcement fund on July 1, 1982 in an amount of not less than one hundred thousand dollars. The monies in the fund shall be appropriated to the director to:

1. Reimburse the department for costs of actions relating to civil violations of this chapter.

2. Pay the attorney general, county attorneys or appropriate prosecutorial agency for unreimbursed costs of actions for prosecuting criminal violations of this chapter.

B. All civil penalties, assessments and fines collected under this article shall be immediately deposited in the fund.

C. The monies in the fund are exempt from § 35-190 relating to lapsing of appropriations.

FILED
MAR 14 1984
ALEXANDER L. STEVAS
CLERK

No. 83-1327

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

CLIFTON N. CHERRY, et ux., et al.,

Petitioners,

v.

WESLEY E. STEINER, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

James W. Johnson
(Counsel of Record)
Lauren J. Caster
FENNEMORE, CRAIG, von AMMON, UDALL & POWERS
A Professional Corporation
100 West Washington Street
Suite 1700
Phoenix, Arizona 85003
(602) 257-8700

Kathleen Ferris, Chief Counsel
Arizona Department of Water Resources
99 East Virginia Avenue
Phoenix, Arizona 85004

Counsel for Respondents

QUESTIONS PRESENTED

Several equal protection issues were raised by petitioners during the course of proceedings below. No equal protection issues now appear among petitioners' statement of the questions presented. Respondents consider those issues abandoned. Rule 21.1.

Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976) 44, 45, 51

Vlandis v. Kline, 412 U.S. 441 (1973) 51

Weinberger v. Salfi, 422 U.S. 749 (1975) 51

Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483 (1955) 44

STATUTES

Arizona Laws of 1948, 6th Special Session, Chapter 5 . . . . . 13, 28, 36-37, 38, 47

Arizona Laws of 1980, 4th Special Session, Chapter 1 . . . . . 1 et seq.

Arizona Revised Statutes

§ 45-301 (Repealed 1980) . . . 47
§ 45-401 20
§ 45-402 . . . . . 3, 4, 45
§ 45-411 53
§ 45-412 43
§ 45-452 4
§ 45-454 . . . . . 3, 4, 16, 23, 45
§ 45-462 . . . . . 3, 15
§ 45-463 16
§ 45-464 . . . . . 4, 16
§ 45-465 4
§ 45-471 16
§ 45-473 16

§ 45-474 16
§ 45-491 4
§ 45-492 . . . . . 4, 16
§§ 45-511 to 45-519 . . . . . 3, 16
§§ 45-541 to 45-545 5
§ 45-561 25
§ 45-562 25
§ 45-563 25
§ 45-565 25
§ 45-566 25
§ 45-567 25
§ 45-568 25
§ 45-576 . . . . . 3, 16
§ 45-591 3

REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

Sup. Ct. R. 21 i

based upon an incorrect construction of prior Arizona law. Their discussion does not relate at all to their other arguments on irrebuttable presumption and incorporation of Initial Active Management Area maps.

Therefore, respondents will not now take issue with petitioners' characterization of the Act point by point, but some of the more inaccurate statements are footnoted.[1]

---

[1] Petitioners state on page 14 that "[w]ith respect to non-irrigation (developmental) uses. . . . a landowner within an AMA [Active Management Area] who was not withdrawing groundwater on June 12, 1980 may not do so in the future." [Emphasis original.] On page 19 they state that "[t]he Act denies to landowners not pumping groundwater on June 12, 1980 any right to do so in the future." Both of these statements are untrue. Indeed on page 15, petitioners acknowledge specific ways to obtain the right to use groundwater for new uses on their lands. They mention some of those alternatives and remark that "[t]hese alternatives share one common characteristic -- all involve the purchase of water, water rights or land from others." But in failing to (Footnote continued)

TABLE OF CONTENTS

BRIEF

QUESTIONS PRESENTED. i

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE. 1

REASONS FOR DENYING THE WRIT AND SUMMARY OF ARGUMENT. 7

ARGUMENT 15

I. THE PUBLIC INTEREST IN PRESERVING THE GROUNDWATER SUPPLIES AVAILABLE TO ALL LANDOWNERS WARRANTED THE FULL EXERCISE OF THE STATE'S POLICE POWER 15

II. LANDOWNERS HAVE NEVER OWNED UNPUMPED GROUNDWATER UNDER ARIZONA LAW. THE COURTS BELOW RULED CORRECTLY ON THIS ISSUE OF STATE LAW. . . 30

III. STATUTORY INCLUSION OF PETITIONERS' LAND IN AN ACTIVE MANAGEMENT AREA DID NOT VIOLATE PETITIONERS' RIGHT TO DUE PROCESS 43

IV. MAPS, DEPICTING THE BOUNDARIES OF THE INITIAL ACTIVE MANAGEMENT AREAS, WERE IN EXISTENCE AND ON FILE WITH THE SECRETARY OF STATE ON THE DATE OF ENACTMENT, AND WERE VALIDLY INCORPORATED BY THE ACT 53

CONCLUSION 56

CERTIFICATE OF SERVICE. 57

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. V 8

U.S. CONST. amend. XIV 8

CASES

Agins v. City of Tiburon, 447 U.S. 255 (1980) 22-26

Andrews v. Drew Municipal Separate School District, 507 F.2d 611 (5th Cir. 1975). 52

Bishop v. Wood, 426 U.S. 341 (1976) 31

Bristor v. Cheatham (Bristor II), 75 Ariz. 227, 255 P.2d 173 (1953) 34-36, 42

Butner v. United States, 440 U.S. 48 (1979). 31

California-Oregon Power Co. v. Beaver Portland Cement Co., 73 F.2d 555 (9th Cir. 1934), aff'd, 295 U.S. 142 (1935). 35

Catchpole v. Narramore, 102 Ariz. 248, 428 P.2d 105 (1967) 32

Cherry v. Steiner, 716 F.2d 687 (9th Cir. 1983). 30

Cherry v. Steiner, 543 F. Supp. 1270 (D. Ariz. 1982), aff'd, 716 F.2d 687 (9th Cir. 1983) . . 9, 10, 30, 46, 48

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821). 32

Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976). 19

Farmers Investment Co. v. Bettwy (FICO), 113 Ariz. 520, 558 P.2d 14 (1976) 39-40

Fourzan v. Curtis, 43 Ariz. 140, 29 P.2d 722 (1934) 34

Friedman v. Suttle, 10 Ariz. 57, 85 P. 726 (1906) 32

Greene v. McElroy, 360 U.S. 474 (1959) 52

Haring v. Prosise, _____ U.S. _____, 103 S. Ct. 2368 (1983). . 31

Hernandez v. Banco De Las Americas, 116 Ariz. 552, 570 P.2d 494 (1977) 32

Hernandez v. County of Yuma, 91 Ariz. 35, 369 P.2d 271 (1962). . 32

Hodel v. Indiana, 452 U.S. 314 (1981) 45, 52

Howard v. Perrin, 8 Ariz. 347, 76 P. 460 (1904), aff'd, 200 U.S. 71 (1906) 33, 37

Hudson County Water Co. v. McCarter, 209 U.S. 349 (1908). 35

Jarvis v. State Land Department, 104 Ariz. 527, 456 P.2d 385 (1969) 39

Kaiser Aetna v. United States, 444 U.S 164 (1979) 26

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). 26

Maricopa County Municipal Water Conservation District No. 1 v. Southwest Cotton Co., 39 Ariz. 65, 4 P.2d 369 (1931), as modified, 39 Ariz. 367, 7 P.2d 254 (1932) 33-34, 37, 41

McDaniel v. Sanchez, 452 U.S. 130 (1981) 32

McGowan v. Maryland, 366 U.S. 420 (1961) 52

Midkiff v. Tom, 702 F.2d 788 (9th Cir.), prob. juris. noted, ___ U.S. ___, 104 S. Ct. 334 (1983) 26

Miller v. Schoene, 276 U.S. 272 (1928) 28-29

NLRB v. Hendricks County Rural Electric Membership Corp., 454 U.S. 170 (1981). 32

Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978) 18, 26

Reichelderfer v. Quinn, 287 U.S. 315 (1932) 18, 26

Salsburg v. Maryland, 346 U.S. 545 (1954) 52

Southwest Engineering Co. v. Ernst, 79 Ariz. 403, 291 P.2d 764 (1955) 27, 29 36-38, 40, 42

Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941 (1982) . . 19, 22

State Compensation Fund v. De La Fuente, 18 Ariz. App. 246, 501 P.2d 422 (1972). 55

State ex rel. Morrison v. Anway, 87 Ariz. 206, 349 P.2d 774 (1960) 38

State v. Williams, 119 Ariz. 595, 583 P.2d 251 (1978). 55

Tibbs v. Florida, 457 U.S. 31 (1982) 30

Town of Chino Valley v. State Land Department (Chino Valley I), 119 Ariz. 243, 580 P.2d 704 (1978) . 40

Town of Chino Valley v. City of Prescott (Chino Valley II), 131 Ariz. 78, 638 P.2d 1324 (1981), appeal dismissed, 457 U.S. 1101 (1982) 1, 8, 9, 20, 22, 23, 30, 41

United States v. Gerlach Live Stock Co., 339 U.S. 725 (1950) 27

STATEMENT OF THE CASE

Petitioners' statement of the case is largely a summary of selected provisions of the 1980 Arizona Groundwater Management Act, 1980 Ariz. Sess. Laws, 4th Spec. Sess., Ch. 1 ("1980 Act" or "Act").

Accurate summaries of the scope and structure of the Act are included in both the District Court's opinion below and the opinion of the Arizona Supreme Court in Town of Chino Valley v. City of Prescott (Chino Valley II), 131 Ariz. 78, 638 P.2d 1324 (1981), appeal dismissed, 457 U.S. 1101 (1982). Petitioners' summary and argument contain several significant errors both in stating what the Act provides and in describing the effect of the Act on rights alleged to exist prior to its passage.

Petitioners' discussion leaves misimpressions of the Act, but it does not relate to their primary argument, which is

(Footnote 1 continued)

mention several other alternatives, petitioners mischaracterize the Act. For example, petitioners may drill wells for their domestic use. § 45-454 [All statutory references are to Arizona Revised Statutes (Cum. Supp. 1983-84) unless otherwise indicated.] They may subdivide their land and pump water to serve the subdivided lots upon demonstrating that an assured water supply exists for such subdivision. § 45-576; 45-591; 45-402.24. And petitioners may apply for a permit to drill wells and pump groundwater. Permits are available for any non-irrigation water use except those that will be served by a municipal or private water company. See, e.g., §§ 45-512 to 45-519.

Petitioners state that "out of those actually drawing or using groundwater on the date of the AMA's creation, only three classes of persons are permitted to continue to do so." (Pet. at 4.) They fail to mention that the classes of persons permitted to continue include every person who was actually drawing and using groundwater as of the effective date of the Act. § 45-462.A.

Petitioners then state that "some, but not all, of the private landowners who had withdrawn or used groundwater in the AMA prior to its establishment" may continue to use groundwater but only if they "qualify for one of three types of 'grandfathered right.'" (Pet. at 4.) Again the Act is mischaracterized. First, everyone who was using groundwater as of the effective date of the AMA may continue to do so. In addition, land irrigated at (Footnote continued)

(Footnote 1 continued)

any time in the prior 5 years may be irrigated. § 45-465.A. Anyone who had not irrigated land but who, by the effective date of the AMA, had made a substantial capital investment toward the subjugation of land is also entitled to a grandfathered right for such land. § 45-452.A. Any person who had a non-irrigation use that had not been fully exercised in the year prior to the creation of the AMA is entitled to a grandfathered right equal to the amount of water that would normally have been used on a full year basis. § 45-464.D. Second, not all persons using groundwater on the effective date of the AMA need qualify for a grandfathered right in order to continue to do so. Domestic wells are exempt, and users of groundwater who are customers of municipal and private water companies need not obtain grandfathered rights. §§ 45-454; 45-492. Third, the 3 categories of grandfathered rights encompass all remaining types of groundwater uses. § 45-462.D.

Petitioners also imply that water companies have unlimited pumping rights. (See Pet. at 4, 15, 19.) This is not so. The ability of water companies to withdraw water is narrowly circumscribed. Water companies may drill wells only within their service areas. § 45-491; 45-492.A. A water company's service area includes only the area where it is providing actual service to customers, which area may be only a portion of the entire area for which it is certificated by the Arizona Corporation Commission to provide service. § 45-402.25. Petitioners state that "[i]f

(Footnote continued)

(Footnote 1 continued)

the holders of 'irrigation rights' own land in such a service area, and desire to devote the land to non-agricultural purposes, the right to use groundwater is lost." (Pet. at 4 n.6.). On page 14, petitioners assert that "[t]he Act permanently eliminates for that individual all other options for use of the land if it lies within a water company's service area." These statements are erroneous. The owner has every option for the non-irrigation development of his property that is available to other landowners within the service area, and there are several means by which groundwater may be used on the land, the most obvious being use of groundwater provided by the water company. The landowner has the further option of returning his land to irrigation.

Petitioners argue that "[t]he transportation of ground water away from the land from which it was pumped will subject the transporter to an award of damages only in very limited instances." (Pet. at 5; see also Pet. at 15.) To the contrary, the transportation of groundwater out of the common hydrologic sub-basin in which it occurs will subject the transporter to damages in every instance except where the transportation is supported by the retirement of an irrigation use in the source basin. §§ 45-541 to 45-545.

While respondents have not controverted the affidavits of petitioners concerning their specific fact situations, respondents have never conceded the conclusions petitioners draw from those affidavits. (Footnote continued)

(Footnote 1 continued)

(Pet. at 6.) To the contrary, respondents pointed out to the District Court in the very early stages of this proceeding that if the facts alleged by petitioners are true, petitioners would be allowed under the Act "to develop their lands for the most part as they intended." (CR 37 at 9.)

groundwater percolating beneath their land and that the Act expropriated their water. The Arizona Supreme Court analyzed the nature of a landowner's interest in unpumped groundwater prior to the Act in Town of Chino Valley v. City of Prescott (Chino Valley II), 131 Ariz. 78, 638 P.2d 1324 (1981), appeal dismissed, 457 U.S. 1101, (1982). The court unanimously concluded:

> [T]here is no right of ownership of groundwater in Arizona prior to its capture and withdrawal from the common supply and . . . the right of the owner of the overlying land is simply to the usufruct of the water. 131 Ariz. at 82, 638 P.2d at 1328.

Accordingly, the Arizona court rejected a claim that the 1980 Act effected a taking of property in violation of the Fifth and Fourteenth Amendments. That decision was then appealed to this Court. Both the contention that the 1980 Act took property without just compensation, and the contention that the decision of the

Arizona court in Chino Valley II itself was such a departure from previously settled Arizona law as to deprive persons of property without due process of law, were among the questions presented in the Jurisdictional Statement in the appeal. The appeal was dismissed for want of a substantial federal question.

In addition, both the District Court and Court of Appeals in the proceedings below independently reviewed Arizona case law and unanimously found petitioners' assertions to be without merit. Cherry v. Steiner, 543 F. Supp. 1270, 1277-78 (D. Ariz. 1982), aff'd, 716 F.2d 687, 692 (9th Cir. 1983).

Petitioners' irrebuttable presumption argument is also initially premised on their interpretation of state law, i.e., the 1980 Act required that land included within Initial Active Management Areas must satisfy one of the criteria for

establishment of Subsequent Active Management Areas. There is no constitutional requirement that Initial Active Management Areas created legislatively, and Subsequent Active Management Areas created administratively, must be established on the same criteria. Nor do petitioners appear to urge such a proposition. The proper due process question on the creation of the Initial Active Management Areas is whether a rational basis existed for a legislative determination to regulate groundwater use in the areas of the State designated for management. The District Court's opinion, adopted by the Court of Appeals, found that "the legislative history is full of support for this legislative categorization." 543 F. Supp. at 1278. Petitioners do not contest this finding. Instead, they assert that the Act itself requires that Initial and Subsequent

Active Management Areas meet the same criteria. This argument, which requires the Court to make an erroneous interpretation of a state statute, was heard and rejected without comment by both the District Court and the Court of Appeals. Even if petitioners' reading of the Act were conceded, the irrebuttable presumption doctrine does not apply to economic regulations such as the 1980 Act.

Finally, petitoners attack the Act as having been incomplete on the date of its enactment. The Act operates by reference to maps on file with Arizona's Secretary of State that depict the boundaries of the Initial Active Management Areas created by the Act. Petitioners assert that the maps were not on file at the precise instant the Governor signed the bill, but were filed on the same day shortly after the signing; they therefore contend that the Act is void. The maps were undisputedly

in existence prior to the bill's enactment. Whether a statute may operate by reference to external documents in existence on the date of enactment is a question of state law. The courts below properly found as a matter of state law that the maps were validly incorporated.

This Court generally refrains from examining state law issues when the District Court and Court of Appeals have concurred in their determination. The questions presented here are state law questions that this Court should not consider.

Moreover, it is unnecessary to review the decision of the Court of Appeals because it correctly sustained the 1980 Act on the merits.

Although petitioners do not state clearly the nature of their asserted rights under prior law, the right they impliedly claim would authorize every

landowner in the State to pump every drop of water that could be found beneath his land and every drop of water that could be drawn to his land from the land of his neighbors in the same basin, and to do so with impunity so long as the water is withdrawn for the beneficial use of his land.

In fact, this could be done under prior law.[2] But this unlimited ability to pump groundwater was not a vested property right. Further, the Arizona Supreme Court placed groundwater users on notice from the beginning that the time would come when demand would outstrip supply and the

---

[2] The only exception was that under the 1948 Groundwater Code, 1948 Ariz. Sess. Laws, 6th Spec. Sess., Ch. 5, the drilling of new wells for irrigation could be prohibited in areas of the State designated by the State Land Department as having insufficient water for irrigation of the lands then in cultivation. Petitioners' lands were not in such an area.

Legislature would be forced to restrict uses and to allocate supplies.

Arizona currently consumes surface water and groundwater equivalent to 171% of annual replenishment. (CR 38 at 4-5.) Groundwater alone is consumed at 7 times the rate of replenishment. (Id.) Irrigation accounts for 89% of the State's total water consumption. (Id.) Yet barely 3% of the State's arable land is in irrigation. (CR 37 at 27.) These few statistics illustrate the disaster that would befall the State if it were unable to restrict and manage the use of groundwater without compensating every landowner who might have had the expectation of an unrestrained ability to pump groundwater.

Regardless of the nature of a landowner's interest in unpumped groundwater under prior law, the Act is sustainable under the police power.

ARGUMENT

I

THE PUBLIC INTEREST IN PRESERVING THE GROUNDWATER SUPPLIES AVAILABLE TO ALL LANDOWNERS WARRANTED THE FULL EXERCISE OF THE STATE'S POLICE POWER.

The Act does not take groundwater from landowner "A" or give groundwater to landowner "B" as petitioners assert. The Act imposes a comprehensive scheme for the regulation and management of the common groundwater resource that percolates beneath the lands of all landowners in each of the Active Management Areas. The Act applies uniformly to all lands within Active Management Areas for the common benefit. All existing uses of groundwater are allowed to continue. § 45-462. No one has been denied the right to commence new uses of groundwater. Everyone may qualify for new uses of groundwater on an equal basis by meeting the conditions

prescribed for those uses by the Act. See, e.g., §§ 45-454, 45-463.E, 45-473, 45-464.F, 45-471, 45-474, 45-492, 45-511 to 45-519, 45-576.

Unpumped groundwater cannot be identified to individual ownership or to separate parcels of land. The groundwater supply is a common resource of the entire basin. The rate of annual recharge in the Little Chino Valley Sub-basin of the Prescott Active Management Area is 3/100's of an acre foot per acre. (CR 37a App. R-5, Table II-1.) Typical urban uses in the Prescott AMA consume 1 acre feet per acre, 33 times the rate of replenishment. Typical irrigation uses consume 4 acre feet per acre, 133 times the rate of replenishment. (Id. App. A-2 at 2.)

This means that virtually every time a landowner in the Prescott AMA pumps from a well, he is withdrawing more water than the amount of replenishment attributable

to his land. Hence, it is almost a certainty that the landowner is withdrawing water not only from beneath his land but from beneath neighboring lands in the common basin as well. Thus, despite petitioners' assertion of the existence of an "ownership rights regime" under prior law, it is impossible for petitioners to identify what groundwater they own, what was allegedly taken away, and what requires compensation. To the contrary, petitioners, together with all other landowners in the basin, will share in an enduring benefit -- the stabilization of water levels and the long-term reliability of a water supply sufficient to sustain reasonable economic and social life indefinitely.

Respondents acknowledge that prior to the Act, petitioners had the ability to drill wells and pump water from their property at will, even to the extent of

REASONS FOR DENYING THE WRIT AND SUMMARY OF ARGUMENT

Petitioners' arguments before this Court turn upon three questions of Arizona law: 1) What was the nature of petitioners' interest in groundwater beneath their land prior to passage of the 1980 Act? 2) Did the 1980 Act require that land included within the Initial Active Management Areas satisfy one of the criteria for establishment of Subsequent Active Management Areas? and 3) Is the 1980 Act void because it operates by reference to maps of Initial Active Management Areas existing at the time the Act was passed and signed by the Governor, which maps were filed with the Secretary of State on that day as required by the Act?

On the first issue, petitioners contend that prior to the 1980 Act they owned a property interest in the unpumped

exhausting the common water supply of the entire basin, so long as it was used in connection with beneficial use of their land. (Petitioners' neighbors had a corresponding unrestricted ability to pump petitioners' lands dry.) But this ability derived solely from the bare existence of a scheme of law and was not a compensable property interest. Value that may derive from a particular legal regime does not ripen into an interest protected by the Constitution against diminution. Reichelderfer v. Quinn, 287 U.S. 315, 318-19 (1932). As the Court said in Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 130 (1978), "[T]he submission that appellants may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable."

This Court has previously commented on the public importance that attaches to the management of a state's water resources. In Colorado River Water Conservation District v. United States, 424 U.S. 800, 804 (1976), this Court said, "[i]t is probable that no problem of the Southwest section of the Nation is more critical than that of scarcity of water." More recently, in the course of determining that Nebraska's restraint on exportation of groundwater discriminated against water users in other states, thereby imposing an unconstitutional burden on interstate commerce, this Court said:

> [A] State's power to regulate the use of water in times and places of shortage for the purpose of protecting the health of its citizens -- and not simply the health of its economy -- is at the core of its police power.

Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941, 956 (1982).

Clearly the welfare of the citizens of Arizona was at stake while the rate of groundwater pumping was allowed to accelerate without regulation and without restriction in the face of critical overdraft on the finite groundwater supply. Annual water consumption in Arizona is 4.8 million acre feet. Annual dependable surface and groundwater replenishment is only 2.8 million acre feet. The shortage is made up by the mining of groundwater. As noted above, groundwater depletion is now more than 7 times the rate of groundwater recharge. Water tables, which already range from typical depths of 350 to 400 feet throughout central Arizona, are dropping at rates of 4 to 14 feet per year. (CR 38 at 4-5.)

The Arizona Supreme Court sustained the Arizona Legislature's invocation of the police power in Chino Valley II. It quoted in full the following declaration of policy in § 45-401:

A. The legislature finds that the people of Arizona are dependent in whole or in part upon groundwater basins for their water supply and that in many basins and sub-basins withdrawal of groundwater is greatly in excess of the safe annual yield and that this is threatening to destroy the economy of certain areas of this state and is threatening to do substantial injury to the general economy and welfare of this state and its citizens. The legislature further finds that it is in the best interest of the general economy and welfare of this state and its citizens that the legislature evoke its police power to prescribe which uses of groundwater are most beneficial and economically effective.

B. It is therefore declared to be the public policy of this state that in the interest of protecting and stabilizing the general economy and welfare of this state and its citizens it is necessary to conserve, protect and allocate the use of groundwater resources of the state and to provide a framework for the comprehensive management and regulation of the withdrawal, transportation, use, conservation and conveyance of rights to use the groundwater in this state. [Emphasis added.] 131 Ariz. at 82-83, 638 P.2d at 1328-29.

Following this quotation, the Arizona court stated:

> We do not doubt but that the overdraft of groundwater in this state is a serious problem which has no chance of correcting itself, and that it is necessary for comprehensive legislation to both limit groundwater use and allocate its use among competing interests. 131 Ariz. at 83, 638 P.2d at 1329.

In Chino Valley II, the Arizona Supreme Court relied in part on this Court's decision in Agins v. City of Tiburon, 447 U.S. 255 (1980). The City of Tiburon was held to have had sufficient interest in protecting its residents from the ill effects of urbanization that it could limit the use of prime suburban land to one single-family house per acre. Under the tests discussed in Agins, the 1980 Act is clearly a valid exercise of the police power. In Agins, this Court considered:

1. Whether the ordinance will "substantially advance legitimate state interests." 447 U.S. at 260. In Sporhase, this Court said the legislative purpose to "preserve diminishing sources

of ground water . . . is unquestionably legitimate and highly important. . . . " 458 U.S. at 954. In the arid Western States, "the desirability of state and local management of ground water" has been "convincingly demonstrated." 458 U.S. at 952. In Chino Valley II the Arizona Supreme Court found that "[t]he 1980 Act furthers legitimate state interests." 131 Ariz. at 83, 638 P.2d at 1329.

2. Whether the ordinance will deny "an owner economically viable use of his land." 447 U.S. at 260. The 1980 Act allows all existing groundwater uses to continue subject to reasonable conservation requirements. Domestic wells, including new ones, are exempt from the Act. § 45-454. All landowners are entitled to apply for new uses of groundwater on the conditions specified by the Act.

3. Whether the ordinance "is, in essence, a determination that the public

at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest." 447 U.S. at 260. This is clearly a situation in which the public at large shares the burdens (and benefits) of govermental regulation. Indeed, petitioners' assertions would require the compensation of every landowner in every Active Management Area before any restrictions could be placed on the development and use of groundwater.

4. Whether there is any indication that the complainants' tract will be the only property affected by the ordinances. 447 U.S. at 262. The 1980 Act applies statewide. The controls imposed in Active Management Areas are imposed uniformly to all lands included in the Active Management Areas.

5. Whether the complainants "will share with other owners the benefits and

burdens" of the exercise of the police power. 447 U.S. at 262. Undeniably petitioners, as members of the general public, will share the benefits of the Act. The Department of Water Resources is required to implement a management plan for the Prescott Active Management Area designed to achieve the goal of "safe yield" by the year 2025, meaning groundwater levels will no longer decline. §§ 45-563, 45-561.6, 45-562.A. The management plan is to include programs to augment water supplies and may also include programs to purchase and extinguish existing groundwater uses. §§ 45-565.A.4, 45-566.A.4 & 6, 45-567.A.4 & 6, 45-568. Yet even if, as petitioners contend, the provisions of the 1980 Act were to affect them more adversely than some other landowners, that would not be sufficient to overturn the Act. The impact felt by them though greater in

degree than that of the rest of the public, would be the same in kind. Reichelderfer v. Quinn, 287 U.S. 315, 320 (1932); Penn Central Transportation Co. v. City of New York, supra.

These tests, satisfied in Agins in the zoning context, are even more convincingly satisfied in the context of regulating use of a resource in short supply that is essential to human and economic life.[3]

---

[3] This case is not at all like Kaiser Aetna v. United States, 444 U.S. 164 (1979), upon which petitioners rely, and Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). Neither case involved regulation of the use of a common resource but involved actual physical invasion of the claimants' property by strangers.

Petitioners appear to rely on Midkiff v. Tom, 702 F.2d 788 (9th Cir.), prob. juris. noted, ____ U.S. ____, 104 S. Ct. 334 (1983), as an analogous fact situation illustrating that if the State "takes property from A and gives it to B," a taking has occurred. Not only was the issue in Midkiff different (i.e., whether a conceded taking was for a private or public purpose), but petitioners' own interpretation of Midkiff demonstrates that it is inapposite. Even if (Footnote continued)

The Arizona Supreme Court has previously sustained restrictions on groundwater pumping under the police power, relying on the pronouncements of this Court. In Southwest Engineering Co.

(Footnote 3 continued)

petitioners' premise were correct that an "ownership regime" existed in groundwater under Arizona law prior to the 1980 Act, there still would be no identifiable corpus of groundwater in the basin belonging to petitioners that could be the subject of compensation. Further, petitioners may qualify for new uses of groundwater from the common source on the same basis as any other landowner. It would also be impossible to determine to whom the water was given.

The remaining decisions cited by petitioners also provide little guidance. Among them is United States v. Gerlach Live Stock Co., 339 U.S. 725 (1950), which petitioners relied on heavily below. Yet Gerlach would defeat their case entirely. This Court, in determining the compensability of water rights taken by the construction of the Friant Dam, looked to state court decisions to determine whether plaintiffs' riparian rights were vested under California law. Even then, this Court noted that the rights taken in Gerlach were rights that were already being exercised, not the unexercised "rights" being claimed here. 339 U.S. at 751-52.

v. Ernst, 79 Ariz. 403, 291 P.2d 764 (1955), it held that the Legislature had acted within the proper scope of the police power in enacting the 1948 Groundwater Code, 1948 Ariz. Sess. Laws, 6th Spec. Sess., Ch. 5., which prohibited the drillihg of new irrigation wells in areas of the State lacking sufficient groundwater to sustain then existing irrigation uses. The Code effectively prohibited the irrigation of hundreds of thousands of acres of undeveloped land that had little or no value except for potential use for irrigated agriculture. The holding was based in part upon this Court's decision in Miller v. Schoene, 276 U.S. 272 (1928). There this Court upheld as a valid exercise of police power the Virginia Cedar Rust Act, which required destruction of red cedar trees to prevent the spread of plant disease to apple orchards. The Arizona Supreme Court

quoted this Court's statement in Miller that there was an unavoidable choice between preserving one class of property or another and that:

> there is, a preponderant public concern in the preservation of the one interest over the other. [Citing cases.] And where the public interest is involved preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property. [Citing cases.] 79 Ariz. at 410, 291 P.2d at 769, quoting 276 U.S. at 279-80.

The Arizona Legislature has not destroyed any class of property, as this Court in Miller v. Schoene said it may when forced to the choice. The 1980 Act allows all existing uses to continue and allows all landowners to qualify for new uses on the conditions prescribed by statute.

or "unpredictable" departure from prior law.

This Court has often declined to examine state law issues when the District Court and Court of Appeals have concurred in their determination, even if the Court might have reached a different conclusion in the absence of such guidance. This Court has said that federal judges who deal regularly with questions of state law in their respective districts and circuits are in a better position to determine how state courts would resolve such issues. E.g., Butner v. United States, 440 U.S. 48, 57-58 (1979); Bishop v. Wood, 426 U.S. 341, 345-47 (1976). See also Haring v. Prosise, ___ U.S. ___, 103 S. Ct. 2368, 2373 n.8 (1983).

The holdings of the Arizona Supreme Court, District Court and Court of Appeals are unassailable. This section of respondents' argument shows that those

II

LANDOWNERS HAVE NEVER OWNED UNPUMPED GROUNDWATER UNDER ARIZONA LAW. THE COURTS BELOW RULED CORRECTLY ON THIS ISSUE OF STATE LAW.

Petitioners, by their statement of the first two questions presented, begin from an unsound premise, i.e., prior to the 1980 Act a landowner "owned" the groundwater beneath his land under Arizona case law. This contention was rejected expressly by the Arizona Supreme Court in Chino Valley II, 131 Ariz. at 82, 638 P.2d at 1328. Absent a violation of due process, this Court regards as binding the highest state court's interpretation of its own opinions. Tibbs v. Florida, 457 U.S. 31, 46-47 (1982). Both the District Court, 543 F. Supp. at 1277-78, and the Court of Appeals, 716 F.2d at 692, reviewed Arizona case law and concluded that Chino Valley II was not a "startling"

decisions are in complete accord with prior Arizona law.

Petitioners' argument is based upon dictum in an early Arizona case that groundwater belongs to the owner of the land. The dictum was used solely to distinguish the use of groundwater from the use of surface water, surface water being governed by the law of prior appropriation. While it is clear that there is no right to rely upon dicta under Arizona law,[4] petitioners nonetheless characterize the dictum as a "governing

---

[4] See, e.g., Hernandez v. Banco De Las Americas, 116 Ariz. 552, 555, 570 P.2d 494, 497 (1977); Catchpole v. Narramore, 102 Ariz. 248, 250, 428 P.2d 105, 107 (1967); Hernandez v. County of Yuma, 91 Ariz. 35, 36, 369 P.2d 271 (1962). This has been the rule since the territorial era. Friedman v. Suttle, 10 Ariz. 57, 63, 85 P. 726, 728 (1906). It is also the rule in this Court. NLRB v. Hendricks County Rural Electric Membership Corp., 454 U.S. 170, 186-88 (1981); McDaniel v. Sanchez, 452 U.S. 130, 141 (1981); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 399-400 (1821).

principle of Arizona law." (Pet. at 10.) Further, petitioners ascribe to this dictum a meaning that is contrary to the results and holdings of the Arizona groundwater rights cases.

Howard and Southwest Cotton

The source of the ownership dictum on which petitioners rely is Howard v. Perrin, 8 Ariz. 347, 353, 76 P. 460, 462 (1904), aff'd, 200 U.S. 71 (1906). The dictum was repeated in Maricopa County Municipal Water Conservation District No. 1 v. Southwest Cotton Co., 39 Ariz. 65, 4 P.2d 369 (1931), as modified, 39 Ariz. 367, 7 P.2d 254 (1932). In both cases the water claimants had alleged appropriations from underground streams. Under Arizona law, surface and underground streams, as distinguished from percolating groundwater, are subject to the doctrine of

prior appropriation.[5] The nature of rights in groundwater was not involved in either case. Southwest Cotton expressly reserved determination of the nature of rights in groundwater for the future. 39 Ariz. at 83-84, 4 P.2d at 376.

Bristor II

The court in Bristor v. Cheatham (Bristor II), 75 Ariz. 227, 255 P.2d 173 (1953), adopted the reasonable use rule for percolating groundwater in Arizona. The mere adoption of that rule is inconsistent with the notion of ownership. The court assumed that it had a choice among different water doctrines other than prior appropriation, including the English rule,

---

[5] Similarly, the dictum was used in Fourzan v. Curtis, 43 Ariz. 140, 29 P.2d 722 (1934), to distinguigh between water law doctrines in holding that the owner of land on which a grassy seep occurred was entitled to its use as percolating water, as against a neighboring landowner's claim that the seep was surface water subject to appropriation.

the reasonable use doctrine, and the correlative rights doctrine. It adopted a rule that both permitted and limited the right to use groundwater to amounts necessary for the beneficial use of land. The court's observation that what is a "reasonable use" changes with facts and circumstances and from time to time, 75 Ariz. at 237-38, 255 P.2d at 179-80, refutes the contention that a landowner owns the groundwater beneath his land. The court also noted the possibility of use of the police power by the Legislature to prevent the exhaustion of water supplies, citing Hudson County Water Co. v. McCarter, 209 U.S. 349 (1908), and California-Oregon Power Co. v. Beaver Portland Cement Co., 73 F.2d 555 (9th Cir. 1934), aff'd, 295 U.S. 142 (1935), but declined to determine whether and to what extent the police power might be used, saying the issue would be decided when

properly presented. 75 Ariz. at 234-35, 255 P.2d at 177-78.

Southwest Engineering

Petitioners completely omit from their "representative sample of excerpts from decisions of the Arizona Supreme Court" (Pet. at 11.) any mention of Southwest Engineering Co. v. Ernst, 79 Ariz. 403, 291 P.2d 764 (1955), the one decision in which the Arizona Supreme Court did consider the contention that the landowner "owned" groundwater beneath his land. Moreover, Southwest Engineering is the Arizona decision most directly in point. There the Arizona court was presented with a challenge to the State's authority to restrict the use of groundwater by individuals. Further, the 1948 statute in dispute was similar to the 1980 Act in that it prohibited the drilling of new wells, other than replacement wells, for irrigation in areas of the State

designated as having insufficient water supplies at then existing rates of withdrawal. Although the 1948 statute was sustained under the police power, the Arizona Supreme Court said that the rule derived from Howard and Southwest Cotton was that as between individual users of groundwater, the doctrine of reasonable use would apply. But:

> Specifically the question was left open as to the right of the state against individuals to regulate the consumption of ground water in the interest of the general welfare. 79 Ariz. at 408, 291 P.2d at 767.

The plaintiff's assertion in Southwest Engineering that it "owned" the groundwater beneath its lands and that such property right was protected against confiscation by the Constitution was rejected. The Court said in part:

> The supply of ground water within the territorial boundaries of the state, or any particular groundwater basin therein, is not unlimited and even though in some instances the limits thereof may

be difficult to apprehend, ultimately and inevitably at one time or another it will become necessary to restrict the use merely because the available users and uses exceed the available supply. We do not doubt that it is the proper sphere of the legislature, in the interest of the general welfare, to say when that time has arrived by establishing the mechanics for its determination and upon such determination prescribing the economical consumption which constitutes the most efficient use of water. [Emphasis added.] Id. at 411, 291 P.2d at 770.

Anway

The issue in State ex rel. Morrison v. Anway, 87 Ariz. 206, 349 P.2d 774 (1960), was whether the 1948 Groundwater Code, 1948 Ariz. Sess. Laws, 6th Spec. Sess., Ch. 5, prohibited the defendants from irrigating land not previously cultivated. The fact that the court took as given that the Legislature could prohibit drilling new wells for irrigation is completely inconsistent with the petitioners' assertions here of ownership.

Jarvis

Likewise in Jarvis v. State Land Department, 104 Ariz. 527, 456 P.2d 385 (1969), ownership was not in issue. The issue was whether an undisputed transportation of groundwater by the City of Tucson injured the plaintiffs. The court found injury. It approved the concept of legislation allocating water use among competing water users by basing its opinion upon a state statute that preferred municipal uses over irrigation uses in considering competing applications to appropriate surface waters. (There was and still is no comparable groundwater preference statute in Arizona.)

FICO

Petitioners' next excerpt is from Farmers Investment Co. v. Bettwy (FICO), 113 Ariz. 520, 558 P.2d 14 (1976), but there the issue was not ownership of groundwater but whether the defendants'

uses of groundwater were "off the land" from which the groundwater was pumped and thus subject to injunction.

FICO renewed the invitation of Bristor II and Southwest Engineering, that the Legislature establish priorities among competing groundwater users. The court said it was not the function of courts to adjust water rights among existing users when there is not enough water to go around. That is the function of the Legislature:

> If it is to the State's interest to prefer mining over farming, then the Legislature is the appropriate body to designate when and under what circumstances such economic interest will prevail. [Emphasis added.] 113 Ariz. at 527, 558 P.2d at 21.

Chino Valley I

In Town of Chino Valley v. State Land Department (Chino Valley I), 119 Ariz. 243, 580 P.2d 704 (1978), the Arizona Supreme Court refused to hold unconstitutional the 1977 act that created the

Groundwater Management Study Commission to draft the 1980 Act. The Court approved the creation of the Commission and referred to its earlier statement in FICO:

> We stated that if one interest was to be preferred over the other, the Legislature was the appropriate body to designate which economic interest would prevail. [Emphasis added.] Id. at 245, 580 P.2d at 706.

Chino Valley II

Finally, in Town of Chino Valley v. City of Prescott, 131 Ariz. 78, 82, 638 P.2d 1324, 1328 (1981), the Arizona Supreme Court said:

> We . . . hold that there is no right of ownership of groundwater in Arizona prior to its capture and withdrawal from the common supply and that the right of the owner of the overlying land is simply to the usufruct of the water.

Summary

More than 50 years ago, the court in Southwest Cotton, supra, accompanied its holding that groundwater was not subject to the doctrine of prior appropriation

with the caveat that selection of the precise doctrine applicable to groundwater was reserved for future determination. When the Arizona Supreme Court first defined rights to the use of groundwater in 1953 by adopting the reasonable use doctrine in Bristor II, supra, it stated that all such rights may be subject to modification by the Legislature under the police power. The Legislature's exercise of the police power prohibiting increased pumping for irrigation was upheld almost immediately in Southwest Engineering Co. v. Ernst, supra. From that decision onward, the Arizona Supreme Court repeatedly stated that authority was reserved to the Legislature to allocate groundwater among competing uses and to prescribe which uses of groundwater are in the best interests of the general welfare of the State.

III

STATUTORY INCLUSION OF PETITIONERS' LAND IN AN ACTIVE MANAGEMENT AREA DID NOT VIOLATE PETITIONERS' RIGHT TO DUE PROCESS.

Petitioners attack the inclusion of their lands in the Prescott Active Management Area as a conclusive legislative presumption that their lands have one or more of the specific characteristics required to be shown for administrative designation of Subsequent Active Management Areas by the Director of the Department of Water Resources.[6]

Petitioners' premise is unsound. The Act does not require that Initial and Subsequent Active Management Areas meet

---

[6] A Subsequent Active Management Area may be designated if the Director finds that: 1) Active Management is necessary to preserve the existing supply of groundwater for future needs; 2) land subsidence or fissuring is endangering property or potential groundwater storage capacity; or 3) use of groundwater is resulting in actual or threatened water quality degradation. § 45-412.A.

the same criteria. Their argument, which would require the Court to make an erroneous reading of a state statute, was heard and rejected without comment by both the District Court and the Court of Appeals.

Absent express provision in the Act, there is no constitutional precept that Initial and Subsequent Active Management Areas be established on the same conditions. The proper question under the due process clause is whether there existed any rational basis upon which the Legislature could have concluded that groundwater use in the Initial Active Management Areas should be managed. Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 488 (1955); Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976).

Although petitioners had the burden of showing that no rational basis existed for

the delineation of the Initial Active Management Areas,[7] they made no attempt to do so. Nor did they attempt to controvert evidence presented below that established several compelling reasons for the designation of those Management Areas. Petitioners have not even denied that these facts show a valid basis for legislative action. Several of these facts were noted by the District Court below, any one of which is sufficient to demonstrate that the Legislature acted

---

[7] "It is established beyond peradventure that 'legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality.'" Hodel v. Indiana, 452 U.S. 314, 323 (1981). See also Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976). The 1980 Act is clearly one that regulates business and "economic life." Domestic wells are generally exempt from all provisions of the Act except that they must be registered and drilled according to certain construction standards. §§ 45-402.7; 45-454.

reasonably and not arbitrarily. For example:

1. The Initial Active Management Areas include the State's major population centers (both existing and projected) that are dependent upon groundwater. Eighty percent of the State's population currently resides in Active Management Areas. The population of the Prescott Active Management Area is expected to nearly triple by the year 2025. (CR 37a at App. A-2, pp. 5-10.) 543 F. Supp. at 1278-1279, 1280.

2. Sixty-nine percent of the groundwater overdraft in the State occurs in Active Management Areas. (CR 37a at App. A-2, pp. 9-10.) 543 F. Supp. at 1278-1279, 1280.

3. The Arizona Water Commission projected an overdraft in the Little Chino Sub-basin of the Prescott Active Management Area of 6,000 to 7,000 acre

feet annually by the year 2020, assuming 4,000 acre feet of additional water is imported from the Colorado River. That projection does not consider the effect of increases in pumping in the Upper Agua Fria Sub-basin, where petitioners' lands are located. (CR 37a at App. R-5, pp. III-35-36, Table LC-1.)

4. Under the 1948 Groundwater Code, 1948 Ariz. Sess. Laws, 6th Spec. Sess., Ch. 5, certain areas of the State had been designated Critical Groundwater Areas pursuant to official administrative determinations by the Arizona State Land Department that groundwater supplies within those areas were insufficient to sustain existing uses. § 45-301.1 (Repealed 1980). Without exception, the aquifers or portions of the aquifers that supply every Initial Active Management Area had been included within Critical Groundwater Areas. (CR 37a at App. M1, M2,

M4 and M5.) 543 F. Supp. at 1280. Conversely, and without exception, every Critical Groundwater Area designated under prior law was included within either an Active Management Area or an Irrigation Non-Expansion Area. (Id.)

5. The former Granite Creek Critical Groundwater Area covered a substantial portion of the Prescott Active Management Area, primarily in the Little Chino Valley Sub-basin. (CR 37a at App. R-5, p. III-35.) Petitioners' lands in the Upper Agua Fria Sub-basin of the Prescott Active Management Area were not in the Granite Creek Critical Groundwater Area. (Appellants' Revised Opening Brief before the Court of Appeals at 47-48.) But several studies and maps prepared by public agencies pursuant to law showed that the Little Chino Valley and the Upper Agua Fria Sub-basins share a common groundwater aquifer. These agencies

included the United States Geological Survey, the Arizona Water Commission, and the Arizona Bureau of Mines at the University of Arizona. (CR 37a at App. M6 and App. A-3; CR 37a at App. M7; CR 37a at App. M8.) The Legislature's sole action in designating the Prescott Active Managment Area was to extend the critical area to encompass the entire groundwater basin, which is essential for effective management.

6. Former administrations and Secretaries of the Interior had threatened to withhold approvals necessary for construction of the Central Arizona Project to import water from the Colorado River to central Arizona, until the State had enacted a program for meaningful groundwater management. (See, e.g., CR 45 at App. A-6, pp. 4-5 and attachment.) It is understandable that the United States might not finance the development and

importation of additional water supplies to areas of the State where no controls on water use exist. Substantially all of the areas of the State that will receive CAP water deliveries, either directly or, as in the case of the Prescott area, by exchange, have been included in Active Management Areas. (Id. at 3.)

7. The Arizona Water Commission, directed by the Legislature and the Arizona Groundwater Management Study Commission to study groundwater supplies, demands and conditions throughout the State and to prepare management recommendations, had recommended management of all areas subsequently included in Initial Active Managment Areas. (CR 37a at App. R-2, pp. 1-2.)

Thus, valid legislative reasons existed for the designation of Initial Active Management Areas as they were delineated by the Legislature.

In simply determining that groundwater usage in certain areas of the State shall be managed, the Legislature made no presumptions of fact concerning petitioners or their lands. This case therefore is not even susceptible of irrebuttable presumption analysis. But even had facts been presumed, application of the doctrine appears limited to legislative presumptions that have infringed important personal liberties or benefits. The doctrine does not apply to statutes involving purely economic regulation. See Weinberger v. Salfi, 422 U.S. 749, 770-74 (1975); Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976).

The three cases cited by petitioners all involved important personal freedoms, and were decided prior to Turner Elkhorn: Vlandis v. Kline, 412 U.S. 441 (1973) (student's right to travel held violated by statutory presumption that a student

with an out-of-state address when applying for college is a non-resident); Andrews v. Drew Municipal Separate School District, 507 F.2d 611 (5th Cir. 1975)(unwed mothers presumed immoral and unfit to be hired as teachers' aides); Greene v. McElroy, 360 U.S. 474 (1959) (security clearance revoked without disclosing to the employee information upon which revocation was based).[8]

---

[8] In the proceedings below, petitioners implied that there existed some constitutional mandate that different areas of the State be treated identically. As noted above, petitioners have abandoned their equal protection arguments. Nevertheless, the facts recited in the text show a valid legislative basis for treating Initial Active Management Areas differently from the rest of the State. Further, the Equal Protection Clause does not apply to classifications between geographic areas. McGowan v. Maryland, 366 U.S. 420, 427 (1961); Salsburg v. Maryland, 346 U.S. 545, 552 (1954); see Hodel v. Indiana, 452 U.S. 314, 332 (1981).

IV

MAPS, DEPICTING THE BOUNDARIES OF THE INITIAL ACTIVE MANAGEMENT AREAS, WERE IN EXISTENCE AND ON FILE WITH THE SECRETARY OF STATE ON THE DATE OF ENACTMENT, AND WERE VALIDLY INCORPORATED BY THE ACT.

Petitioners attack the Act as having been incomplete on the date of its enactment because it operates by reference to maps required to be on file with the Secretary of State on the effective date of the Act, which depict the Initial Active Management Areas. The Act states, "The boundaries of the initial active management areas are shown on the maps filed in the office of the secretary of state on the effective date of this chapter." § 45-411.B. Petitioners assert (without citation to the record) that the maps were not on file with the Secretary of State at the precise instant the Governor signed the bill but were filed

bill and the effective date of the Act. Petitioners also admitted this fact below (Id.) and here (Pet. at 22-23.).

Many legislative enactments must and do operate by reference to external documents. Respondents are not aware of any authority that the legislators must even see the items to which reference is made. Incorporation by reference is valid so long as the legislators intended the statute to incorporate or to operate by reference to those items and the items were in existence on the date of the enactment. See, e.g., State v. Williams, 119 Ariz. 595, 598-99, 583 P.2d 251, 254-55 (1978).[9]

---

[9] State Compensation Fund v. De La Fuente, 18 Ariz. App. 246, 501 P.2d 422 (1972), relied upon by petitioners, has no application to the claim of defect petitioners urge upon this Court. Among other failings in the workman's compensation statute there involved, the statute did not refer to any source of guidance in existence at the time of its enactment.

later that same day. Petitioners therefore claim the Act was incomplete when it left the Legislature and that the maps had no existence at the time the bill was signed. The District Court and the Court of Appeals properly rejected this argument on the basis of common sense and the undisputed evidence.

That evidence, and indeed petitioners' admissions, establish that:

1. The maps were in existence prior to the enactment of the statute. Petitioners admitted this fact below:

"It is also clear that these maps were prepared in the office of the Arizona Water Commission by personnel of that state agency prior to June 12, 1980." (Petitioners' Motion for Summary Judgment, CR 31 at 68.)

2. The maps were delivered to the Secretary of State and filed on June 12, 1980, the date the Governor signed the

CONCLUSION

The petition should be denied.

RESPECTFULLY SUBMITTED this 12th day of March, 1984.

James W. Johnson
(Counsel of Record)
Lauren J. Caster
FENNEMORE, CRAIG, von AMMON,
UDALL & POWERS

Kathleen Ferris
Chief Counsel
Arizona Department of
Water Resources

By: James W. Johnson
James W. Johnson

By: Lauren J. Caster
Lauren J. Caster

Counsel for Respondents

CERTIFICATE OF SERVICE

Three copies of the foregoing Brief in Opposition were served by hand-delivery on March 12, 1984 on counsel for petitioners at the following address:

DANIEL J. McAULIFFE
(Counsel of Record)
MARK WILMER
ROBERT B. HOFFMAN
SNELL & WILMER
3100 Valley Bank Center
Phoenix, Arizona 85073.

Counsel for petitioners are the only persons on whom service of this Brief in Opposition is required.

James W. Johnson

James W. Johnson